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# BRIEF FOR PLAINTIFF IN ERROR.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1887.**

No. 200.

## DAYTON S. MORGAN and E. ASHLEY SMITH, Plaintiffs in Error,

*VS.*

## FREDERICK EGGERS, Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

EDWARD ROBY,
*Counsel.*

CHICAGO LEGAL NEWS CO., PRINTERS.

*No. 200.*

SUPREME COURT OF THE UNITED STATES,
October Term, 1887.

DAYTON S. MORGAN et al.,
*Plaintiffs in Error,*

v.

FREDERICK EGGERS,
*Defendant in Error.*

# BRIEF FOR PLAINTIFFS IN ERROR.

This was an action of ejectment, begun and carried to final judgment in the *Circuit Court of the United States* for the District of Indiana.

The pleadings are in the simple *form* prescribed by the Statutes of Indiana. The verdict or finding is "for the plaintiff," in the *form* prescribed by the statute of that State for a general verdict or finding upon all the issues submitted by the pleadings.

## DECLARATION.

*Filed July 26, 1882.*

The plaintiffs, Dayton S. Morgan and E. Ashley Smith, citizens of the State of New York, complain of the defendant, Frederick Eggers, a citizen of the State of Indiana, and say that they, plaintiffs, as tenants in common, are the owners in fee simple, and entitled to the possession of the following described real estate in the County of Lake in the State of Indiana, at the District aforesaid, to wit:

All of the north part of lot two (2) in section thirty-six (36), township thirty-eight (38) north, of range ten (10), west of the second principal meridian, which lies west of the track of the Lake Shore and Michigan Southern Railroad, and north of a line parallel with the north line of said lot two (2), and seven hundred and fifty-three (753) feet south therefrom.

That the defendant, Frederick Eggers, at the district aforesaid, now holds possession of the said described real

estate without right, and for more than a year past has unlawfully kept the plaintiffs out of possession.

Wherefore the plaintiffs demand judgment for the recovery of said real estate, and two thousand dollars damages for being kept out of possession and for other proper relief.

U. J. HAMMOND,
Att'y for Plaintiffs.

PLEA.

*Filed October 10, 1882.*

Comes now the defendant by counsel and files his answer herein, in the words following, to-wit:

The defendant for answer denies every allegation in the complaint.

A. C. Harris, for defendant.

RECORD OF THE TRIAL, VERDICT AND JUDGMENT.

*January 20, 1883.*

And afterwards, to-wit, on the the 20th day of January, 1883, at the November Term of said court before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above entitled cause were had, to-wit:

(JURY WAIVED.)

Come the parties by counsel and by agreement this cause is submitted to the court for trial.

(Stipulation in this court supplies the written submission which the clerk omitted from the transcript.)

(VERDICT.)

And the court having heard the evidence and being fully advised finds for the plaintiffs,

(JUDGMENT,)

and orders and adjudges that they are entitled to and shall have and recover of defendant the possession of so much of said lot two (2) as lies south of the south line of lot numbered one (1) as indicated by a fence constructed and maintained by the defendant as and on said south line, said fence running from the State line easterly to Lake Michigan, and assesses the damages at $1 and costs taxed at $ ——, which the plaintiffs shall recover of defendant.

All of which is finally ordered adjudged and decreed.

## MOTION TO AMEND JUDGMENT.

(*Shown by the Record and Bill of Exceptions.*)

The plaintiffs in the above entitled cause, Dayton S. Morgan and E. Ashley Smith, move the court to amend and reform the judgment entered in the above entitled cause at the November Term of this court, 1882, on the 20th day of January, 1883, so that said judgment shall conform to the complaint in said cause and to the finding or verdict of the court rendered upon the trial of said cause.

UPTON J. HAMMOND AND EDWARD ROBY,
Attorneys for said plaintiffs.

## ORDER DENYING MOTION.

Come now the parties by their respective attorneys, and thereupon the court being sufficiently advised in the premises doth now overrule the motion, filed by the plaintiffs herein on the 23d day of April, 1884, to amend and reform the judgment of the court heretofore entered herein; to which ruling of the court in overruling said motion the plaintiffs, by their attorneys, now except and file their bill of exceptions herein in the words and figures following, to wit:

Then follows the bill of exceptions, stating the motion to amend and the exception to the order denying it, and containing the *Opinion* delivered by the Judge upon the motion.

(Stipulation and exemplification supply the signature of the Judge to this bill of exceptions, which the clerk omitted from the copy included in the transcript.)

## ERRORS ASSIGNED.

That said judgment doth not pursue the issue and finding thereon, rendered and entered of record, as the law directs and requires.

Also, the Circuit Court erred in refusing to amend and reform said judgment.

(PRAYER FOR REVERSAL.)

Wherefore the plaintiffs in error pray that so much of said judgment as appears to be erroneous may be reversed, annulled and set aside, and that the judgment of the Circuit Court in refusing to amend and reform said judgment may be reversed, and that said judgment on the issues in

said cause may be reformed and amended, and such further proceedings had that there may be no error therein.

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After assigning above errors on the record, upon consultation and study, the undersigned arrived at the opinion that *Mandamus* to require the Circuit Court to make the amendment, was the proper remedy, and that *Error* would not lie to compel the amendment. An exemplification of the record of the Circuit Court in the cause was annexed to and made part of the petition, which was docketed as No. 10, original, of October Term, 1884. In oral argument and in "brief in reply," at page 3, we called the attention of the court to the present case (then pending as No. 1256) with the assignment of errors and prayer above quoted, with the citation and proof of service also on file, adding the statement: "So, if "the petitioners are entitled to a remedy on the record of "the Circuit Court, they will have it in one case or the "other. If mandamus is the proper remedy, it will come "in this case, and they will pay the costs of the Writ of "Error. (Ins. Co. v. Comstock, 16 Wall. 258, p. 271.)"

The case was very considerately heard upon the return to the writ, and oral as well as printed arguments on both sides, and decision rendered (*Exparte Morgan*, 114 U. S. 174) to the effect that the errors above assigned are cognizable on Writ of Error.

The Statutes directing the Circuit Court, in the case, are in part statutes of the United States, and in part Statutes of Indiana applied by the Statutes of the United States, namely:

UNITED STATES REVISED STATUTES.

"SEC. 914. The practice, pleadings and forms, and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms, and modes of proceeding existing at that time, in

like causes in the courts of record of the state, within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

"SEC. 648. The trial of issues of fact in the Circuit Courts *shall be by jury*, except in cases of equity, and of admiralty and maritime jurisdiction, and *except* as otherwise provided in proceedings in bankruptcy, and *by the next section*."

"SEC. 649. Issues of fact in civil cases in any Circuit Court, may be tried and determined by the court without the intervention of a jury, wherever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

(These sections seem mandatory; and where it appears by the record that a jury was waived, and the trial was by the court, without the intervention of a jury, it would seem a necessary presumption that the court proceeded lawfully; and that the parties or their attorneys of record had filed with the clerk a stipulation in writing waiving a jury as the law required. Omnia praesumuntur rite et solemniter acta.

The mandate is, in effect, that issues of fact shall not be tried in the circuit courts except by jury unless the parties file a stipulation in writing waiving a jury.)

"SEC. 700. When an issue of fact, in any civil case, in a Circuit Court, is tried and determined by the court, without the intervention of a jury, according to section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court, upon a Writ of Error or upon Appeal; and when the finding is special, the review may extend to the determination of *the sufficiency of the facts found*, to support the judgment."

"SEC. 987. When a circuit court enters judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, *in cases where such a finding is allowed*," —(The statute does not deem it possible that a circuit court can enter judgment in any other case. If the court acts as a court, it will act in obedience to the above sections, or it

is not allowed to act at all)—"Execution may, on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for new trial."

These sections fix the law, in relation to trials by the court, in the Circuit Courts of the United States. They leave room for no latitude.

And so it has been adjudged. Even in Louisiana, where the local methods of practice were like the methods of chancery, this court held, that *this statute is binding on the federal courts, and can not be disregarded. Insurance Co. v. Tweed*, 7 Wallace, 44, p. 51.

It would seem that the absence of a written stipulation would not affect the jurisdiction of the court, to try the case in lieu of a jury. (Phillip's Practice, 51, 153; edition of 1876, pp. 53, 153, Ch. XXII, first page.)

Lawful authority to act, in lieu of the jury, must be presumed, when it appears that the jury was waived, and the issues were tried by the court, and a finding thereon was announced. Grignons, Lessee, v. Astor, 2 How. 319; Tilton v. Cofield, 93 U. S. 165.

It is stipulated by Counsel for both parties here, that a jury was waived below, and the case submitted to the court for trial pursuant to the statute, by stipulation in writing signed by the attorneys for both parties and filed with the clerk, the absence of that submission from the record being first discovered when the record was printed.

This court announced, in 1855, that, "parties may, by "consent, waive the trial of issues of fact by a jury, and "submit the trial of both facts and law to the court." It will not be a "mis-trial." But if error appears on the face of the record, the judgment entered will be reversed. (Guild v. Frontin, 18 How. 135).

Notwithstanding there is no submission in writing, this court may, according to the course of the common law, review the record on Writ of Error, and determine whether the judgment pursues the finding. In fact may examine everything except the rulings of the court on the trial, which can not be examined in any case where no bill of exceptions is made.

Bond v. Dustin, 112 U. S. 606–9.

Campbell v. Boyreau, 21 How. 223, p. 226.

Flanders v. Tweed, 9 Wall. 425.
Payne v. Central Vermont R. R., 118 U. S. 158.
Allen v. St. Louis Bk., 120 U. S. 30.
Alexandria C. Co. v. Swann, 5 How. 83.
Y. & C. R. R. Co. v. Myers, 18 How. 246, 252.

THE REVISED STATUTES OF INDIANA contain the following provisions, enacted and in force September 19, 1881.

"Sec. 335. DEFINITION. The pleadings are formal allegations by the parties, of their respective claims and defenses, for the judgment of the court."

"§ 336. DISTINCT FORMS ABOLISHED. All the distinct forms of pleading heretofore existing, inconsistent with the provisions of this act, are hereby abolished; and hereafter the forms of pleadings in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined are modified as prescribed by this act."

"§ 337. WHAT ALLOWED. The only pleadings allowed are: *First*, the complaint by the plaintiff; *second*, the demurrer and answer by the defendant; *third*, the demurrer and reply by the plaintiff.

"§ 338. COMPLAINT — CONTENTS — PARAGRAPHS NUMBERED. The first pleading on the part of the plaintiff is the complaint. The complaint shall contain: *First*. The title of the cause, specifying the name of the court, and the county in which the action is brought, and the names of the parties to the action, plaintiff and defendant. *Second*. A statement of the facts constituting the cause of action in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. *Third*. Where the complaint contains more than one cause of action, each shall be distinctly stated in a separate paragraph and numbered. *Fourth*. A demand of the relief to which the plaintiff may suppose himself entitled. If the recovery of money be demanded the amount thereof shall be stated."

"§ 363. The court, * * may, in all proper cases, upon motion, order a bill of particulars of the claim of either party, and abstracts of title to be furnished."

"§ 1050. ACTION FOR POSSESSION. Any person, having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same, by action, to be brought against the tenant in possession."

"§ 1054. CONTENTS OF COMPLAINT. The plaintiff in his complaint, shall state that he is entitled to the possession of the premises, particularly describing them, the interest he claims therein, and that the defendant unlawfully keeps him out of possession."

"§ 1055. ANSWER IN DENIAL—EFFECT. The answer of the defendant may contain a denial of each material allegation or statement in the complaint, under which denial the defendant shall be permitted to give in evidence every defense to the action that he may have, legal or equitable."

"§ 1056. Where the defendant makes defense it shall not be necessary to prove him in possession of the premises."

"§ 1057. The plaintiff must recover on the strength of his own title."

"1060. * The plaintiffs may recover, against one or more of the defendants, the premises, or any part thereof, or interest therein, or damages according to the right of the parties; but the recovery shall not be for a greater interest than that claimed."

"§ 1064. NEW TRIAL OF RIGHT—BOND. The court rendering the judgment, on application made within one year thereafter by the party *against whom* judgment is rendered, his heirs, assigns or representatives, and on the applicant giving an undertaking, with surety to be approved by the court or clerk, that he will pay all costs and damages, which shall be recovered against him in the action, shall vacate the judgment and grant a new trial. The court shall grant but one new trial under the provisions of this section."

"§ 545. VERDICT. The verdict of a jury is either general or special. A general verdict is that by which they

pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving judgment thereon to the court."

"§ 550. JURY HOW WAIVED. The trial by jury may be waived by the parties, in all actions, in the following manner: *First.* By failing to appear at the trial. *Second.* By a written consent in person or by attorney, filed by the clerk. *Third.* By oral consent in open court, entered on the record."

"§ 551. SPECIAL FINDING BY COURT. Upon trials of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally *for the plaintiff or defendant* unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial, in which case the court shall *first* state the facts in writing, and *then* the conclusions of law upon them, and judgment shall be entered accordingly."

"§ 552. The provisions of this Code respecting trials by jury apply, so far as they are applicable, to trials by the court."

"§ 564. When a trial by jury has been had, and a general verdict rendered, the judgment must be in conformity to the verdict."

"§ 565. Where the verdict is special, or where there has been a special finding on particular questions of fact, the court shall render the proper judgment."

It is decided and determined by the Supreme Court of the State of Indiana, and was so established before the proceedings referred to, that a finding by the court, not made at the request of either or any of the parties is not a special finding. *Northcutt v. Buckles*, 60 Ind. 577, p. 579; *Caress v. Foster*, 62 Ind. 145, p. 153–4.

This statute seems to be applied, by the federal court, to trials in ejectment, before it. Where the Circuit Court of the United States, adopts the process pointed out by a State law, there must be no essential variance. Such a variance is a new rule, unknown to any act of Congress, or the State

law, professedly adopted. (*McCracken v. Hayward*, 2 How. 608.)

The *forms* and *effects* of findings and verdicts are as prescribed by the local law. (*Pensacola Ice Co. v. Perry*, 120 U. S. 318.)

*The substance of sections 649 and 987 of the national statutes is, that if, in an action at law in a Circuit Court of the United States, the parties waive a jury, the court shall be allowed to hear and determine in place of the jury, and to render a verdict: which shall be in substance, form and effect the same as a verdict of a jury in the case, rendered as prescribed by the common or statute law.*

Section 914 provides that: the practice, pleadings *and forms*, as well as *the modes of proceedings*, in actions at law, in the circuit courts of the United States, shall conform, as near as may be, to the practice, pleadings and forms, and modes of proceeding, existing at the time, in like causes, in the courts of record of the state, within which such circuit courts are held. The Indiana statute, above quoted, prescribing *the form* of pleadings in ejectment was followed in this case. The state statute (§545) prescribes *the form* of a general verdict "*for the plaintiff*" or "for the defendant." and describes a special verdict. Such form of general verdict was held good in Hobart's Reports, and the definition of special verdict, found in the statute, ante dates the Entries of Coke and Rastell. Section 551 provides that when the court is by agreement substituted for a jury, "it shall "not be necessary for the court to state its finding, except "generally, for the plaintiff or defendant, unless one of the "parties requests it, with a view to excepting to the decision of the court, upon the questions of law involved in "the trial; in which case the court *shall* first state the facts "in writing, and then the conclusions of the law upon "them."

Let us change the form of words to give the equivalent. For this statute is an express and explicit command: "Upon trials of questions of fact by the court *it shall be* "*necessary* for the court to state its finding, generally for "the plaintiff or defendant, unless one of the parties requests "a special finding, with a view of excepting to the decision of "the court upon the questions of law involved in the trial; "in which case the court *shall* first state the facts in writing, "and then the conclusions of law upon them" (the next step

is totally distinct, as distinct as if the finding was the verdict of a jury) "and judgment shall be entered accordingly." "The provisions of this Code respecting trials by jury, apply, "so far as they are applicable, to trials by the court. When "a trial by jury has been had, and a general verdict ren- "dered, *the judgment must be in conformity to the verdict.* Where "the verdict is special, or where there has been a special "finding on particular questions of fact, the court shall "render the proper judgment."

Statutes are not to be construed as derogatory to the common law, farther than the intent to depart from the common law clearly appears. Statutes *declaratory* of the common law, and applying the common law to new remedies are to be interpreted and applied according to their purpose.

The statute of Indiana alters the common law, governing trials, *only*, in that it allows the judge, by consent of the parties to be substituted for a jury, in *actions at common law;* and, in case of such substitution, it permits either party to demand not only a special verdict detailing the facts, but also, a separate legal opinion as to their effect, which is to be distinct from the judgment; and judgment shall be entered accordingly. In this the course exactly conforms to the common law of jury trial (except that a jury can not be compelled to give a special verdict). A special verdict states all the facts, is in writing, and is submitted for the opinion of the court upon it; the opinion of the court is pronounced, and judgment is entered accordingly. Hence the only change from the common law, is, that the judge may be substituted for a jury, and, if he gives a special verdict, his opinion upon the facts, so found, shall be delivered in writing, instead of orally, as the custom was at common law.

Whether the judges hold that the national statute (Sec. 914) binds them to this *mode of proceeding*, which requires a judge to state his opinion *in writing*, on a special verdict delivered by him, stating the facts he finds, or whether he may follow the old *mode of proceeding* and give his opinion orally, in view of the great number and uniform decisions of this court as to the requisites and qualities of special verdicts, and general verdicts of judges, in cases where trial by jury is waived, it will not be questioned that the national statute contains every other requisite of the Indiana statute for such trials; that *the national statute is derogatory of the common law only, in permitting the parties to substitute the judge for the jury in trial of cases at common law;* and that

the common law applies to govern such trials and all the modes of proceeding; that the trial is still in a court authorized to hold plea according to the course of the common law; and that the law governing the making of the record, the steps to be recorded, and the force and effect of the record, is supplied by the common law. The statute is in effect: "The trial of issues of fact, in common law "cases, in the circuit courts of the United States shall be by "jury, except cases may be tried and determined by the "court wherever the parties elect. In which case the "court shall render a general or special verdict, which "shall have the same effect as the verdict of a jury." In this paraphrase we simply we give the words the construction they must have in view of the common law, and apply the mandatory properties of the word *may*. (*Dwarris on Statutes*, 712.)

How can the finding of the court have the effect which the common law gives to the verdict of a jury, if it is not entered solemnly of record, so that we can know what it is? How can it be, or be known to be general or special, or have the effect of such a verdict unless it has the place of such a verdict in the record?

At common law the verdict was always plainly entered as in *Rastell's Entries*, 253; *Coke's Entries* 184–216; *Runnington on Ejectment*, 232–3, 478–9, 510; *Coke on Littleton*, 227 a, b; *Aston's Entries*, 308; *Harris' Entries*, 341, 356; *Mallory's Entries*, 43–4; *Lilly's Entries*, 513; 4 Co. Inst. 87. Then follows: ideo consideratum est—

Judgment can be given only on what has gone before in the record.

Co. Litt. 39 a.

Cunningham Law Dic. title judgment.

Tomlin Law Dic. title *Judgment* and Record.

This court holds plea according to the course of the common law. The very writ of error it has issued in this case is in the words found in the above cited entries, where they are in English, and is an exact translation of those in Latin.

So the common law enters into and controls the whole matter.

Either this case was tried, and there was a verdict below separate from the judgment, or it was a mis-trial, not according to the course of the common law. But the record sent up shows a general verdict for the plaintiff, duly and regularly rendered, in the form prescribed both by the national and state statute, sufficient at common law, and re-

corded according to the regular course of the common law. Shall it not have the effect of a general verdict of a jury so delivered and recorded? It does not appear that the judgment begins a new paragraph. But in all of Coke's and Rastell's Entries, and in most of the precedents above cited, there is no paragraph after the verdict and before the judgment. So this record is right in that respect. It does not confound verdict and judgment, because, like all the precedents, it is written without paragraphs.

Recording the complete verdict, this record proceeds, thus: "The court being fully advised, finds *for the plaintiffs*, and orders and adjudges that they are entitled to," etc. Had the clerk written the words *the court* before the word *orders*, or had he chosen the words "it is ordered and adjudged," no shadow of claim could be made that the court below disobeyed both statutes, national and state, that the clerk did not make the record in conformity to the order prescribed by the law, and that this record could not be read and understood according to the course of the common law. The judgment, consequent upon the issue and verdict thereon, begins, "and"—a different matter— It continues with the words "orders and adjudges;" words never found in a verdict. It continues "that they are entitled to"—"adjudges that they are entitled to;" this is a conclusion of law upon the facts going before. What is there in this, on which to set aside the verdict and impeach the part of the record including the verdict, which is perfect and impregnable, tried by the rules and precedents, and according to the course of the common law?

The opinion of the Judge of the court below, successor to the Judge who rendered the verdict, seems to be, that a state of "anarchy" prevailed in Indiana Circuit at the time of this trial; that the common law did not prevail; that the State practice as established by its statutes and adjudged cases, was advisory only; that the United States laws did not require obedience of *Judges;* that in that place there is a government of men and not of laws; that as in the court of Amurath, the law remains in the breast of the judge until he shall determine the whole case with his fiat. The opinion goes even to the extent of holding that *the common people*, and even persons learned in the law, cannot know the effect of an issue tried, of a verdict rendered and recorded, or of a judgment record, by application of any known and established *rules of law*, but that the effect rests in the breast and in the interpretation, or caprice of the man who presides in

the court, where the record remains enrolled. That, in the circuit courts of the United States, cases are no longer at law, or in equity; conducted, if at law, according to due course and process of law; but each judge is a prince conducting the proceedings, and framing the perpetual memorials thereof, according to Justinian's Institute (Lib. 1, Tit. 2 § 6): "Quod principi placuit, legis habet vigorem:" (What is pleasing to the prince hath the force of law); or conducting the proceedings like Virgil's Rhadamanthus: Leges fixit precio, atque refixit.

The obloquy such principles must cast upon the institutions of our country has been sounded from Lord Coke (4 Inst. 55) to Chancellor Kent (1 Com. 342) and ought to be apparent to every thoughtful mind to-day.

To one who has made the study of law a profession, who has, under the discipline of the courts, spent years in learning those laws of practice and proceeding in which the orderly and just course and process of the law moves in this government *for the people*, the doctrine, advanced, seems parallel to the views held by that emperor, who wrote his statutes in fine characters, and posted them on high pillars, so that the people could see, but could not read them.

An eminent member of this court is reported to have said at the Centennial of the Constitution, that the foundation of the national existence under the constitution lays in the respect of the people for the laws.

It is a proverb in parts of the old world that: *An ignorant magistrate makes sedition.*

Certain it is, that if in our system of government—judges disregarding their specific oaths—may make new laws, or disregard those laws established for the *certainty* and *security* of judical administration, judges who adopt such courses are in close sympathy, of action, with those who under the red flag proclaim: "down with the law."

The judgment was rendered while Judge Gresham presided. Denying the motion to amend while Judge Gresham was Postmaster General, Judge Woods (his successor) gave it as his opinion, that the finding and judgment are not separate and distinct, and that the meaning is the same as if the entry read in a different way—an unlawful way.

Plaintiffs in error insist.

I.

Record: Recordum, is a memorial or remembrance of the proceedings, *and acts*, of a court of justice, which hath power to hold pleas, according to the course of the common law, of real or mixed actions, etc.

Coke's Institutes 260 a.

1 Bl. Com. 69; 3 Id. 24.

II.

What the law requires to be done, and appear of record, can only be done and made to appear by the record itself, or an exemplification of the record.

Elliot v. Piersol, 1 Peters, p. 340.

III.

In suits at common law the record will be re-examined in this court according to the rules of the common law.

(The authorities on this are the same as cited in support of paragraph VI, post.)

IV.

The record of final judgment in a court of justice which hath power to hold pleas according to the course of the common law, should, in each case where defense is made, contain

(1) *An issue* of fact or of law.

(2) If the issue is of fact, the record must show that the case is *tried* by a jury, or that the jury is waived, and that the trial is by the judge.

(3) The next thing required to be shown by the record is *the verdict* upon the issue committed to the jury or judge for examination. (3 Bl. Com. 378.)

(4) The last thing is *the judgment* which is, "the sentence of the law, upon the matter contained in the record."

3 Blackstone Com. 395.

"In a disputed case, *a verdict* is simply the answer of a jury to the court on the issues of fact committed to their examination; *a judgment* is the conclusion that flows from the law and the verdict."

Stennett v. Scott, 2 Eng. (7 Ark.) p. 281.

[The course and process of the common law in actions of ejectment is plainly shown in *Gilbert on Ejectment*, pp. 1, 92–

95, and in the precedents of Records shown in the *Entries* above cited.]

VI.

Whether the case is tried by a jury, or by consent of the parties the Judge is substituted for the jury, the finding is a *verdict;* to be recorded as such, and to have the same force and effect in either case; and the record will be examined and tried in this court according to the rules of the common law

Upon records like the one before us these rules have been applied, both before (18 Wallace, 237–254) and since the statutes, authorizing exceptions to be saved to the rulings of the judge during the trial where a jury is waived.

Craig v. Missouri, 4 Peters, 410, pp. 424–8, 439.
Weems v. George, 13 How. 190, p. 197.
Graham v. Bayne, 18 How. 60.
Guild v. Frontin, 18 How. 135.
Insurance Co. v. Tweed, 7 Wal. 44.
Bassett v. U. S., 9 Wal. 38.
Norris v. Jackson, 9 Wal. 125.
Copelin v. Ins. Co., 9 Wal. 461.
Coddington v. Richardson, 10 Wal. 516.
Genneres v. Campbell, 11 Wal. 193.
Miller v. Life Ins. Co., 12 Wal. 285.
Dirst v. Morris, 14 Wal. 484.
City of Richmond v. Smith, 15 Wal. 429, pp. 437–8.
Dickenson v. Planters Bank, 16 Wal. 250.
Insurance Co. v. Folsom, 18 Wal. 237.
Town of Ohio v. Marcy, 18 Wal. 552.
Insurance Co. v. Sea, 21 Wal. 158.
Ætna Ins. Co. v. Boon, 95 U. S. 117.
Boogher v. Ins Co., 103 U. S. 90.
United States v. Harris, 106 U. S. 634.
Bond v. Dustin, 112 U. S. 604.
Martinton v. Fairbanks, 112 U. S. 670.
Allen v. St. Louis Bank, 120 U. S. 30.

VII.

In the regular course of the common law, it is the duty of the jury to pronounce its verdict on the issue, and of the clerk to record it.

"When the jury have delivered in their verdict, and it

is recorded in court, they are then discharged; and so ends the trial by jury." (3 Blackstone Com. 378).

When the judge is substituted for the jury it is his duty, in like manner to pronounce his verdict, which shall have the same effect as the verdict of a jury.

United States Revised Statutes, Sec. 649.

By Indiana practice the duty is precisely the same.

Indiana Revised Statutes, Secs. 551–555.

To have *the same effect* as the verdict of a jury it must be recorded, in like manner.

VIII.

After verdict, the successful party is, of course, entitled to the judgment of the court. *Runnington on Ejectment*, 393.

The court must enter a judgment on the verdict, or set it aside, and grant a new trial. (Mitchel v. Geisendorf, 44 Ind. 360.)

According to the course of the common law, judgment cannot be entered until the verdict or decision upon the issue has been pronounced and recorded.

Gilbert on Ejectment, 92–114.
Runnington on Ejectment, 401.
Adams on Ejectment, 328.
Tyler on Ejectment, 582.
3 Blackstone Com. 395.
3 Chitty's Blackstone, Appendix 12.

"Judgment is the sentence of the law, upon the matter contained in the record." "The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but is the determination and sentence of the law."

3 Blackstone Com. 395.

Judgment is entered after the verdict, and is distinct from it.

3 Blackstone Com. 395.

The making up of the judgment and writing the same out upon the record are both acts of the clerk and never the act of the court.

Gilbert on Ejectment, 92.
Runnington on Ejectment, 401.
Adams on Ejectment, *328.
Tyler on Ejectment, 382.
Viner's Abridgment, title *Amendment* (I), 16, 22.
Bacon's Abridgment, title *Amendment and Jeofails* (F).

Mason v. Fox, Cro. Jac. 632.
Usher v. Dansey, 4 Maule & Selwyn, 94.
Rees v. Morgan, 3 T. R. 349.
Short v. Coffin, 5 Burrow, 2730.
*The Bank of Kentucky* v. *Wister*, 2 Peters, 318 and 3 Peters, 431.
*Woodward* v. *Brown*, 13 Peters, 1.
*Stockton* v. *Bishop*, 4 How. 155, p. 168.
Fite v. Doe, 1 Blackford, (Ind.) 127.
Smith v. Myers, 5 Blackford, 223.
McManus v. Richardson, 8 Blackford, 100.
Miller v. Royce, 60 Indiana, 189.
The State v. Cross, 6 Indiana, 387.
Sherman v. Nixon, 37 Indiana, 154.
Jenkins v. Long, 23 Indiana, 460.
Bales v. Brown, 57 Indiana, 282.
Latta v. Griffith, 57 Indiana, 329.
Silver v. Butterfield, 2 Indiana, 24.

IX.

In Courts of the United States the distinction between cases at law and in equity is rigidly preserved. (Constitution, Art. 3, § 2; Amendment, VII; R. S. §§ 753, 648, 914, 861, 862.)

By the Constitution and statutes the circuit courts of the United States have power to hold pleas (in cases at law) according to the course of the common law; other course is prohibited.

United States v. Wilson, 118 U. S. 86, p. 90.
McConihay v. Wright, 121 U. S. 201, p. 205.
Basey v. Gallagher, 20 Wall. 670.
Thompson v. Railroad Companies, 6 Wallace, 134.
Bennett v. Butterworth, 11 How. 669, p. 674.
Northern Pacific R. R. Co. v. Paine, 119 U. S. 561.

X.

Hence we have, before us, a record of the proceedings and acts, of a court of justice which hath power to hold pleas, in the case, according to the course of the common law as stated by the sages of the common law above quoted in paragraph numbered I.

A record *can only be tried by itself, by bare inspection.* It can not be assisted, or aided, or contradicted, or in any manner varied, by evidence dehors the same.

Comyn's Digest, *title* Record B. E. F.
Coke on Littleton, 117, b. 260.
Crosswell v. Byrnes, 9 Johns. 287.
Young v. Thompson, 14 Ill. 380–1.
3 Blackstone's Commentaries, 24.
Waldron v. Green, 4 Wend. 409.
In re Negus, 10 Wend. 40.
McKnight v. Dunlap, 4 Barb. 36.

The form of the writ of error brings up the record for trial by bare inspection, according to the course of the common law.

3 Chitty's Blackstone, Appendix XXI.

(See the Writ of Error in this case, printed record, p. 6.)

Under these rules we inspect the record brought up printed above at the beginning of this brief.

The issue is shown by the declaration and plea.

That a jury was waived, and the court substituted for the jury, for the trial of the issue, next appears.

Next appears a general verdict "for the plaintiffs."

Then follows the judgment.

But in making up this judgment the clerk has not followed the issue, nor the verdict; and the plaintiffs moved the court to amend it, so that it shall conform to the complaint in said cause and to the finding or verdict of the court rendered upon the trial of said cause.

The local statutes of Indiana which affect the case, show that the essential steps of common law trial are jealously preserved.

Plaintiffs in Error, as plaintiffs in Ejectment, by their declaration, or complaint, alleged that they were owners in fee simple, and entitled to the possession of *all the north part* of Lot 2, in Sec. 36, T. 38 N., R. 10, W. etc., which lies *west of the track of the Lake Shore and Michigan Southern Rail Road and north of a line parallel with the north line of said Lot, and* 753 *feet south therefrom;* that the defendant held possession of the said described real estate without right, and unlawfully kept the plaintiffs out of possession; and plaintiffs asked judgment for the recovery of said land.

In the petition for Mandamus we stated that the lot extends from the state line to Lake Michigan, and contains

61.50 acres; about 20 acres of which are south of the south line of the land sued for, and about 20 acres are east of said railroad; making 40 acres of said lot outside of the land described in the declaration.

The local practice of Indiana, authorizes the plaintiff, in ejectment to be required to furnish an abstract of his title; and the defendant, before pleading to the action, made a written motion: "that the plaintiffs be ruled to file an abstract of title, showing their alleged title to said lands, to the end that he (defendant) may be advised, as to their pretended title, to the lands in controversy." Such abstract of title was filed, and appears in full in the Exemplification.

Then the defendant put in a plea of general issue, called an answer, in these words: "*The defendant for answer denies every allegation in the complaint.*"

*The form*, of the complaint and answer, are prescribed by the local statute. By that statute, *their effect* is substantially the same as a declaration in Ejectment and plea of *not guilty*, a nd consent rule at common law.

There was nothing in the pleadings, that put in issue, in any form, the location of the boundary line of the lot, or made any evidence, as to its location, relevant. The local law made the defendant's pleading an admission, that he was in possession of the land sued for. (R. S. Ind. § 1056). By the local law, any evidence as to the boundary, was entirely irrelevant to the issue. (*Applegate v. Doe*, 2 Ind. 169, p. 170; *Volts v. Newbert*, 17 Ind. pp. 190–1; *Doe v. Hall*, 2 Ind. 24.) At common law the question of boundary could not be tried on those pleadings. (*Doe v. Wilson*, 2 Starkie, 477; *Cottingham v. King*, 1 Burrow, 623, p. 630–1; *Conner v. West*, 5 Burr. 2672.) The court had nothing to do with the location of the boundary. (*Farrow v. Farrow*, 2 J. J. Marshall, 388; *Simpson v. Shannon*, 5 Littel (Ky.), 322, p. 324.)

This is not only good law but good sense. A alleges: "I own lot 2. B is in possession and keeps me out of it. I pray to be put in possession." B on his part answers: "I admit that I am in possession of lot 2. But I deny that A owns that lot." The court fixes a day for them to bring their witnesses, and orders that a jury come. When they come to the trial, at the day given, B says: "I admit that A owns lot 2. That question needs no trial. I concede that. But I wish this jury to point out the boundary between lot 1, which is my lot, and lot 2 which A has sued for."

These old common law cases are in point. Plaintiff sued

for one cottage, and garden. Defendant entered into the consent rule, which required him "to specify in the consent *for what premises he intends to defend*, and consent to receive a declaration in ejectment, and plead not guilty, and at the trial of the issue, to confess lease, entry and ouster, and possession of the premises, *in respect of which he defends* and insists *upon title only*." ADAMS' EJ. *16, 267. If defendant, in the consent rule, adopted the same description that the plaintiff had adopted in his declaration, it would be impossible for any one to say that the boundaries of that parcel of land were in issue in the case. The object of the consent rule was and that of the statute is to get a trial on the merits. And where the plaintiff declares for a lot by its number, or describes it as a cottage and garden, and the defendant by his pleading says: that is a sufficient description, I will defend by that description—there is no controversy as to boundaries.

By the local statute, (Ind. R. S. § 1060) the plaintiff may recover against the defendant the premises, or any part thereof. This statute only affirmed the common law. (Gilbert on Ejectment, 93–4.)

The case being the common action of Ejectment, at issue on a *declaration*, for land distinctly described, a naked plea of *general issue*, and a confession that the defendant was in possession of the land sued for, a jury was waived; and the finding of the court as entered of record is in these words: "*And the court having heard the evidence, and being fully advised,* "*finds for the plaintiffs.*" (January 20, 1883.)

Upon this, the clerk being ordered to enter judgment, recorded the judgment in the following words: "And "*Orders* and *Adjudges* that they are entitled to, and shall "have and recover, of defendant, the possession of *so much* "*of said lot two* (2) *as lies south of the south line of lot number* "*one* (1), *as indicated by a fence constructed and maintained by* "*the defendant as and on said south line. Said fence running from* "*the State line easterly to Lake Michigan*, and assesses the "damages at $1, and costs taxed at $ —, which the said "plaintiffs shall recover of said defendant, all of which is "finally ordered, adjudged and decreed."

In point of fact, this is a departure from the declaration; being a judgment for some 30 acres of land not mentioned in the declaration. If dictated by defendant's attorney, it would have been *a fraudulent judgment*, intended to let the defendant keep all the lands sued for, without giving any intimation on the face of the judgment, that there is any

judgment or finding against the plaintiff, for any part of the land described in the declaration. Yet this effect, (which is clearly possible) can not be ascertained from the record of the judgment. What is the judgment, as to possession of the land sued for, can not be determined from the judgment entry itself, but only by parol evidence dehors the record. Such form may be used for what is called by an old writer, "*stealing land by subtlety.*"

Afterwards, the plaintiffs moved the Circuit Court to amend and reform the judgment, and make the same conform to the complaint in said cause, and to the finding or verdict of the court rendered upon the trial of said cause. This motion was carefully argued, but was denied; the district judge delivering the following

OPINION:

"Motion to amend judgment.—WOODS *Dist. Judge.*

Morgan and Smith sued Eggers in ejectment, for the recovery of real estate described as follows: "All of the north part of lot two (2), in section thirty-six (36), etc., which lies west of the track of the Lake Shore and Michigan Southern Railroad, and north of a line parallel with the north line of said lot two (2), and 753 feet south therefrom." The defendant answered by a general denial, and upon the issue so joined, a jury being waived and trial had by the court, a finding and judgment of the tenor following were entered: "Come the parties and by agreement this cause was submitted to the court for trial; and the court having heard the evidence, and being fully advised *finds* for the plaintiffs; And *Orders* and *Adjudges* that they are entitled to, and shall have, and recover of defendant, the possession of so much of said lot (2) as lies south of the South line of lot one (1), as indicated by a fence constructed and maintained by the defendant as and on said south line, etc."

The plaintiffs now insist that there is an unqualified general finding for the plaintiff, and that in conformity with this, the judgment should have been for the recovery of the land as described in the complaint, and that so much of the description set forth in the judgment as refers to the fence constructed by the defendants, should be expunged.

It was competent for the court, under the issue, to find to what extent the defendant was guilty, or had held unlawful possession of the premises described; and if under the evidence it appeared that a fence had become or was the

boundary of such occupation, it was proper that the fact should be stated as finding, and judgment, of the court.

The finding and judgment in this instance are not separate and distinct, as perhaps it would have been better to have had them. The meaning however is clear. It is as if the entry read in this way:

"And the court having heard the evidence, etc., finds and orders and adjudges that the plaintiffs are entitled to and shall have and recover of the defendant, etc." The motion for correction is therefore overruled.

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So the Judge, holding the Circuit Court for the District of Indiana, opines: that the forms, and methods of proceeding, adopted and established by the common law, and which are essential, to preserve the methods of trial, prescribed by the laws of the United States, and the certainty of court records, form no part of the law of that court; that the suitors from other states, or the defendants who may be compelled to yield to its jurisdiction, by the process of the United States, have no rights which its judges are bound to respect, as to the course of the verdicts and judgments; but that those judges are at liberty to confound verdict and judgment; and, by introducing confusion into the simplest and clearest proceeding known to the law, to render a judgment, in form in favor of a party, though in fact, against him, in such terms that on the record, he shall have no redress.

The opinion puts us to our primer lessons. If it was not that of an officer in high judicial place, we would say little. But as it is the deliberate opinion of the presiding Judge of the United States, in a great state, that legal rights are trifles, and *the system* of administering justice is an indifferent matter, we will essay in argument, to show what the system is, and *why* it is essential to substantial justice.

## ARGUMENT.

Plaintiffs in Error believe that they are entitled to a remedy.

The Circuit Court denies them a remedy.

Their remedy is through WRIT OF ERROR or MANDAMUS.

Where *Mandamus* is the proper remedy, *Error* will not lie. (*Insurance Co. v. Comstock*, 16 Wallace, 258.) This Court has decided, that, on this record, the remedy is by writ of Error. *Ex Parte Morgan*, et al., 114 U. S. 174.

The judgment is in these words:

THE COURT "*Orders and Adjudges that they* are entitled to, "and *shall have and recover of defendant* the possession of *so* "*much of said lot two* (2) *as lies south of the south line of lot* "*number one* (1) *as indicated by a fence constructed and main-*"*tained by the defendant as and on said south line. Said fence* "*running from the State line easterly to Lake Michigan*, and as-"sesses the damages at $1, and costs taxed at $— which the "said plaintiffs shall recover of said defendant all of which "is finally ordered, adjudged and decreed."

That this judgment entry is wrong is evident.

[1] There was no averment of damages in the declaration; no issue on their amount. No evidence could have been given to show damages or amount. (*Mansur* v. *Straight*, 103 Ind. 358; *Larned* v. *Hudson*, 57 N. Y. 151.) This action was begun in the national court; and in national courts the Court of Error allows no departure from the rule, that the judgment must be based on averment. (*Harrison* v. *Nixon*, 9 Pet. 503; *Graham* v. *Bayne*, 18 How. 61–2.)

The claim for mesne profits, and for damages for withholding possession, are separate and distinct causes of action which must be pleaded, if any recovery therefor is desired.

Larned v. Hudson, 57 N. Y. 151.
Mansur v. Straight, 103 Ind. 358.

[2] The judgment is for more land, and is for different land, from that described in the declaration.

The law is, that the subdivisions of public lands touching an Indian boundary line, or water course, or other natural obstruction, shall bound thereon (2 U. S Stat. at large 313–4; Doe v. Hildreth, 2 Ind. 274, pp. 280–3). The court will take judicial cognizance of Lake Michigan and its character; and that if lot 2 reaches Lake Michigan, the lake is necessarily its external boundary. So too the State Line. If lot 2 touches the State Line, it is necessarily bounded by that line. (4 Stat. at Large 663.) It is by this judgment entry assumed to be the fact that Lot 2 is bounded on the west by the State Line, and on the east by the lake.

The Lake Shore and Michigan Southern Railroad is mentioned in the declaration. If the road runs in Lake Michigan outside of the line of lot 2, it could not be a boundary. If it runs upon lot 2, it must occupy or cut off some portion;

and it was only that part of lot 2, west of that part, of the lot, thus occupied or cut off by the railroad, that was described, and sued for in the declaration. The boundaries as described in the declaration are conceded by the manner in which the defendant elected to plead. *Applegate v. Doe*, 2 Ind. 170.

Again: the declaration did not describe all that part of the lot lying west of the railroad; but only *that part* of so much of the lot situate west of the railroad, as lies *north of a certain line.*

*The declaration* being for *only that part* of lot 2 lying *west* of the railroad and *north* of the line fixed; *the judgment* is for *all* of lot 2 that lies south of the south line of lot 1, extending through from the State line to Lake Michigan.

The court will take cognizance of the fact that in government surveys and subdivisions of sections, lot 2 can not include any part of lot 1. (*Brown v. Clements*, 3 How. 650 pp. 663–5.) And if the South line of lot 1, extending from the State Line to Lake Michigan, is the *north* boundary of any part of lot 2, it is, for that extent, the north boundary of the whole lot. (*Ibid.* 3 How. 663–5, *and the Statutes and Orders there cited and construed*.) The shore of Lake Michigan runs along this lot from Northwest to Southeast, so that there is a small portion in the East end that is not exactly south of the straight north line of the lot, extending from the State Line to Lake Michigan.

The judgment is for *all* lot 2, except this little east point, and includes not only the land occupied by the railroad and that cut off by the railroad, but it also includes all that part of lot 2, lying south of the line designated in the declaration, as the south line of the piece sued for.

[3] The insertion in the judgment of the words, "as in- "dicated by a fence constructed and maintained by the "defendant, as and on said south line, said fence running "from the State line easterly to Lake Michigan," was improper. (This will fully appear on the argument *post.*)

Applegate v. Doe, 2 Ind. 169, 170.
Voltz v. Newbert, 17 Ind. pp. 190–1.
Doe v. Hall, 2 Ind. 24.
Farrow v. Farrow, 2 J. J. Marsh. 388.
Simpson v. Shannon, 5 Littel, 324.
Doe v. Wilson, 2 Starkie, 477.
Cottingham v. King, 1 Burrow, 623, p. 629.
Connor v. West, 5 Burr. 2672.

The plaintiffs have not only a strong interest,—*they have a right to have a judgment free from error;* and free from surplusage, *or false entries that may mislead or operate to their prejudice.*

*What is their remedy?*

Touching ejectment, the statute of Indiana (§ 1064) provides: "The court rendering the judgment, on application "made within one year thereafter, *by the party, against whom "judgment is rendered,* his heirs, assigns or representatives, "and on the applicant giving an undertaking, with surety "to be approved by the court or clerk, that he will pay all "costs and damages which shall be recovered against him "in the action, shall vacate the judgment and grant a new "trial."

Two things! The court can not sit as a court of error. It can not vacate the judgment and let the verdict stand: but must set aside the verdict and issue a *venire de novo*, so that the case will be tried, as if there had never been a trial.

This statute is binding on the federal court, in cases in ejectment. *Equator Co.* v. *Hall*, 106 U. S. 86. Where the Circuit Court of the United States, adopts the process pointed out by a State law, there must be no essential variance. Such a variance is a new rule unknown to any act of Congress or the State law professedly adopted. (*McCracken* v. *Hayward*, 2 How. 608.)

The law, then, gave no right to any party to have the judgment set aside, but to the one, *against* whom, the judgment was rendered.

The verdict, in our case, is "for the plaintiffs" on the whole issue.

There is not a word, in the judgment, indicating that it is against the plaintiffs. The plaintiffs, having no judgment against them, could not, under that statute, have the judgment set aside.

This statute was passed in view of the law, established by the authorities and precedents below shown, that the jury must find as to the whole land, and if the jury finds the defendant not guilty as to any part of the land, judgment must be entered *against the plaintiff* as to that part of the land whereof the jury have found against him. (*Smith* v. *Fuller*, 2 Strange, 786; *Touch* v. *Dalton*, Ibid.)

The verdict was for the plaintiffs. *They can never get a stronger verdict than that. Why should they be compelled to jeopardize their verdict, when after another verdict, for them, the*

*clerk may write out the same identical judgment?* Why should the government be put to the expense of holding court, for the purpose of repeating the same operation?

Neither the letter nor the spirit of this statute for new trials intended it to be a remedy for any such case as this. *The plaintiffs could not resort to this statute to rectify this judgment.*

It seems that where a verdict is sufficient, the Supreme Court may render judgment on the verdict.

*Barnes v. Williams*, 11 Wheaton, 415.

A party in whose favor judgment is rendered may prosecute a Writ of Error for its reversal.

But in this case the judgment only requires to be amended, according to certain and long established principles, set forth in the following cases.

*Woodward v. Brown*, 13 Peters, 1, 2.
*Bank of Ky. v. Ashley*, 2 Peters, 327.
*Miller v. Royce*, 60 Ind. 189.
*The State v. Cross*, 6 Ind. 387.
*Sherman v. Nixon*, 37 Ind. 154.
3 Blackstone Com. 407–410.
Smith v. Fuller, 2 Strange, 786.
Flindell v. Fairman, 11 Price, 410, 411.

The power to amend, and corresponding rights, are expressly affirmed by statute, they were given by the common law.

United States Revised Statutes Sec. 954: "No summons, "writ, declaration, return, process, *judgment*, or other pro- "ceedings in civil causes *in any court* of the United States, shall "be abated, arrested, quashed *or reversed, for any defect* or "want of form * * and such court *shall* amend every "such defect and want of form."

This refers to the court in which the record remains, or the appellate court, and *the statute is mandatory.*

Though this judgment is for damages without averment, though it is for more land, and different land from that described in the declaration, though it inserts a boundary about which there was no averment, and as to which evidence would have been wholly irrelevant, though it does not follow the declaration and verdict, the Circuit Court for the District of Indiana, has deliberately refused to correct the judgment.

In *ex parte Crane* (5 Peters, 192), this court quoted from Blackstone, that *the Writ of Mandamus* "issues to the judges "of any inferior court, commanding them, to do justice ac-

"cording to the powers of their office, whenever the same "is delayed. For it is the peculiar business of the Court of "Kings Bench, to superintend all other inferior tribunals, "and therein to enforce the due exercise of those judical or "ministerial powers, with which the crown or legislature "have invested them: and this, not only *by restraining their "excesses*, but also by quickening their negligence, and *ob-"viating their denial of justice*."

*Have plaintiffs in error a right to amendment?*

That is to be determined *by the record.*

The opinion of the Judge of the Circuit Court is, that "the finding and judgment, in this instance, are not sepa-"rate and distinct." He says: "perhaps it would have "been better to make them so,"—intimating a doubt on that subject. He says: "It is as if the entry read in this "way: And the court having heard the evidence, etc., "finds and orders and adjudges that the plaintiffs are en-"titled to, and shall have and recover of the defendant, "etc." He leaves the whole formal finding *for the plaintiffs* on the evidence, out of his calculation.

The common law can only be annulled by statute. It can not be set aside, and other courses adopted at the caprice of Circuit or District Judges. (1 Blackstone Com. 69.) It is the rigid law of the courts of the United States; necessary to preserve each man's rights, and to allow all people to understand their rights, and courts and officers to administer the law, throughout the wide extent of the national jurisdiction.

The Judge who delivered the opinion of the court below, evidently thinks that there is no distinction between the functions of the judge and clerk; that there is no *necessary* distinction between the verdict, or the finding which stands for a verdict, and the judgment entry thereon.

The nature of a judgment record is such that it can never be submitted to parol evidence, to determine which is the act of the court, and which is the act of the clerk. An Appellate Court can not take such evidence, to determine whether it can review a judgment upon error assigned, or must amend the record, because the matter complained of is the misprision of the clerk. Hence it is decided, that where the judge dictated the amount of the judgment, the

computation was still the act of the clerk. *Sherman v. Nixon*, 37 Ind. 154.

A record imports verity, and can only be tried by itself, by bare inspection. It can not be assisted, or aided, or contradicted, or in any manner varied, by evidence, dehors the same.

Comyn's Digest *title* Record, B. E. and F.
1 Inst. 260.
Co., Litt. 117 b.

Even the minutes of rules and proceedings, made by the judge or clerk, can not be received to explain or give effect to a record. Nor can other judgment records, made at the same time.

Crosswell v. Byrnes, 9 Johns. 287.
Young v. Thompson, 14 Ill. 380–1.
Waldron v. Green, 4 Wend. 409.
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McKnight v. Dunlap, 4 Barb. 36.
Lane v. Bommelman, 21 Ill. 143.
Eppinger v. Kirby, 23 Ill. 521.
Lawrence v. Fast, 20 Ill. 338.

In *Crosswell* v. *Byrnes* (9 Johns., p. 288, note) it was attempted to introduce the testimony of the judge, as to the trial, and the manner in which the record had been made, but by the court it was held, that nothing could be asked that would affect the legal effect of the record.

"What the law requires to be done and appear of record, "can only be done and made to appear *by the record itself*, or "an exemplification of the record."

*Elliott v. Piersol*, 1 Peters, p. 340.

COKE INST. 260, a "Record, Recordum, is a memorial or "remembrance in rolls of parchment, of the proceedings "and acts of a court of justice, *which hath power to hold plea* "*according to the course of the common law* of real or mixed "actions." etc., * *

"And the rolls being the records or memorials of the "judges of the courts of record, import in them such incon-"trollable credit and verity, as they admit no averment, plea, "or proof to the contrary. And if such a record be alleged, "and it be pleaded that there is no such record, it shall be "tried only by itself; and the reason hereof is apparent; "for otherwise, (as our old authors say, and that truly) *there* "*should never be any end of controversies, which should be in-*"*convenient;* * but yet during the term wherein any "judicial act is done, the record remaineth in the breast of

"cording to the powers of their office, whenever the same "is delayed. For it is the peculiar business of the Court of "Kings Bench, to superintend all other inferior tribunals, "and therein to enforce the due exercise of those judical or "ministerial powers, with which the crown or legislature "have invested them: and this, not only *by restraining their* "*excesses*, but also by quickening their negligence, and *ob-*"*viating their denial of justice.*"

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Eppinger v. Kirby, 23 Ill. 521.
Lawrence v. Fast, 20 Ill. 338.

In *Crosswell* v. *Byrnes* (9 Johns., p. 288, note) it was attempted to introduce the testimony of the judge, as to the trial, and the manner in which the record had been made, but by the court it was held, that nothing could be asked that would affect the legal effect of the record.

"What the law requires to be done and appear of record, "can only be done and made to appear *by the record itself*, or "an exemplification of the record."

*Elliott v. Piersol*, 1 Peters, p. 340.

COKE INST. 260, a "Record, Recordum, is a memorial or "remembrance in rolls of parchment, of the proceedings "and acts of a court of justice, *which hath power to hold plea* "*according to the course of the common law* of real or mixed "actions," etc., * *

"And the rolls being the records or memorials of the "judges of the courts of record, import in them such incon-"trollable credit and verity, as they admit no averment, plea, "or proof to the contrary. And if such a record be alleged, "and it be pleaded that there is no such record, it shall be "tried only by itself; and the reason hereof is apparent; "for otherwise, (as our old authors say, and that truly) *there* "*should never be any end of controversies, which should be in-*"*convenient;* * but yet during the term wherein any "judicial act is done, the record remaineth in the breast of

"the judges of the court, and in their remembrance, and "therefore the roll is alterable during that term, as the "judges shall direct; but when that term is passed, then the "record is in the roll, and admitteth no alteration, aver- "ment or proof to the contrary."

In *Crosswell v. Byrnes*, (9 Johnson,) where it was attempted to vary the effect of the record, by an entry on the minutes, of a rule for judgment, the court said, p. 290: "to give an "entry on the minutes that authority, would destroy *the* "*certainty, order* and *solemnity* of enrollments."

The Circuit Courts, of the United States, have power to hold pleas according to the course of the common law.

The machinery is adapted, to move in particular circles, and to produce particular results—the wheels to mash into the cogs of other wheels, in their several courses, to adjust themselves to each other and communicate the action of sovereign power and reciprocal right, according to the course of the common law. If particular states believe they have adopted new and useful improvements, they can be adopted in these courts, only as they come in, as parts of the original machine, to accomplish the results for which it was designed.

These are not only to grant or deny the prayer of a suitor, but to proceed *according to due course and process of law;* and to attain the result, with the certainty, *order*, and solemnity, which is required by the common law.

And no man can be deprived of life, liberty or property but by due course and process of law.

If the record before us is inspected and tried by the rules which govern the making up of records of courts proceeding according to the course of the common law, the verdict and judgment are distinct; but on the return to the alternative writ of mandamus there was an attempt to try the effect of the record by the testimony of witnesses. That is: by a statement apparently signed by W. Q. Gresham, who was District Judge of Indiana in 1883, but who in 1884 resigned that office and became Postmaster General.

Of course, if he can testify upon the subject, it must be under oath, and subject to cross-examination, and we should have an opportunity to produce testimony to contradict him and show *the exact truth.*

Where a matter of fact is mixed with matter of record it must be tried by a jury (*Lytle v. Lee*, 5 Johns. 112; *Thomas v. Rumsey*, 6 Johns. p. 33; *Drinkwell v. Fowkes*, 1 Ld. Raym. 212). In the case at bar, if we were required to look out-

side of the record, petitioners would produce two witnesses who would testify positively that the finding for the plaintiff was distinctly announced by the judge, and the judgment was entirely separate. Suppose that the judge who tried the case should testify to the contrary, it would be extremely unpleasant, though necessary, to treat him like any other witness, and impeach his testimony—

But we need not continue this line of thought. *The judgment records of the Circuit Court of the United States must be such that they can be read without the assistance of the Judge of Indiana*—they must be read and understood alone.

To ascertain which of this entry is verdict, and which judgment, we will recur to the iron forms of the common law; which law defines the power and function, of each part of *due course and process of law*, in ejectment.

1*st*. *The issue.*

2*d*. *The verdict, which, being recorded, ends the trial.* (3 Bl. Com. 378.)

3*d*. *The judgment.*

The words recorded are:

The cause is submitted to the court for *trial*.—

The court *finds* for the plaintiffs.—

And *orders* and *adjudges* that they shall have and recover of defendant.—

## THE ISSUE.

THE ISSUE IN THIS CASE, AND THE ONLY THING THE COURT HAD POWER TO TRY, WAS, WHETHER THE PLAINTIFFS WERE THE OWNERS IN FEE SIMPLE, AND ENTITLED TO THE POSSESSION OF THE LAND DESCRIBED IN THE DECLARATION. THE COURT HAD NO QUESTION ON THE BOUNDARY OF THAT PARCEL BEFORE IT.

TOMLIN LAW DIC. "*Issue* * generally signifies the "point of matter issuing out of the allegations and pleas of "the plaintiff and defendant, in a cause. 1 Inst. 126; 11 "Rep. 10."

"*An issue of fact is where the plaintiff and defendant have "agreed, upon a point, to be tried by a jury.*"

"An issue was called general, where the defendant pleaded the general issue, to the plaintiff's declaration."

*To determine what the issue was, resort must be had to the pleadings.*

Craig v. Missouri, 4 Peters, 410.

Stockton v. Bishop, 2 How. 155, pp. 167–8.

In *Garland v. Davis*, 4 How. p. 148, we read: "The evi- "dence must be limited to the plea. (Mar. Ins. Co. v. "Hodgson, 6 Cr. 206; 4 Wheat. 64, in case of The Divina "Pastora.) The court says: 'you must not admit the in- "'troduction of evidence varying from the facts alleged' (9 "Peters, 483. Harrison v. Nixon). The *probata* should con- "form to the *allegata*. (Boone v. Chiles, 10 Peters, 177.)"

Again, in *Harrison v. Nixon*, 9 Peters, p. 503: "The "proofs must be according to the allegations of the parties; "and *if the proofs go to matters not within the allegations, the "court cannot judicially act upon them as a ground for its decis- "ion;* for the pleadings do not put them in contestation."

"Matter out of the issue can not be heard by the jury. "All such matter is coram non judice—and verdict on it "void." *Foster* v. *Jackson*, Hobart, 53.

"The evidence offered must correspond to the allegations "and be confined to the point in issue. (*Greenleaf Ev.* "§ 51.)"

In the case at bar, the location of the boundary line, between lots 1 and 2 was not at issue; evidence thereon was wholly irrelevant.

Games v. Stiles, 14 Peters, 333.
Applegate v. Doe, 2 Ind. 169.
Voltz v. Newbert, 17 Ind. 191.
Doe v. Hall, 2 Ind. 24.
Farrow v. Farrow, 2 J. J. Marshall (Ky.), 388.
Tongue v. Newell, 17 Md. 228–9.

The plaintiffs did not sue for any part of lot one. The suit was only for that part of lot 2 particularly described.

THE ISSUE IN EJECTMENT, in the locality of the case at bar, has been the subject of careful regulation, first by Rule of the United States Court, and later by Statute.

At the common law, where the action was begun between fictitious parties, the courts compelled the person in possession, to enter into the consent rule, before they would permit him to make a defense. By this, he agreed that at the trial he would confess the lease, entry and ouster to have been made, as alleged in the declaration, and to rely solely on the merits of his title. ADAMS *on Eject.* [ * 16. ] "With "respect to the conditions required from the party appear- "ing to the action, before he is permitted to be made defend- "ant, * * the object of this rule is to insure a "trial upon the merits * * the person appearing

"*specifies therein, for what premises he intends to defend,* and "consents * to receive a declaration in ejectment, "and plead *not guilty,* (and) at the trial of the issue, to con- "fess lease, entry and ouster, *and possession of the premises,* "*in respect of which he defends,* and insists *upon title only.*" IBID. [* 267.]

This was the common law as in force in Indiana in 1842, and prior to the statute revising the subject. *Rawley v. Doe,* 6 Blackford, 143.

In the Seventh Circuit, (which included Indiana) by rule of the court, the defendant having entered into the consent rule, was bound to admit at the trial, that he was in possession, of the premises claimed by the lessor of the plaintiff. *Games* v. *Stiles,* 14 Peters, 322, p. 332.

*Lessee of Dunn* v. *Games,* 1 McLean, 321, p. 328.

Upon the issue so made, this court adds: "*this was not a* "*dispute about boundaries, but of title;* and in such a case, the "rule referred to is salutary, and supersedes the necessity "of proving the possession of the defendant."

(*Games* v. *Stiles,* 14 Peters, p. 332–3.)

The general law, in such case, was thus stated by the Maryland Court of Appeals: "The appellee * *thereby con-* "*cedes the general identity of the premises in controversy, and* "*can not controvert, under his general issue, the location* of ap- "pellant's pretensions as set out in his Narr."

*Tongues' Lessee v. Newell,* 17 Md., 229.

Statutes of Indiana, regulating the pleadings and practice, changed nothing of substance, but reduced this law to the utmost simplicity and *precision.*

Ind. R. S. §§ 1050, 1054, 1055, 1056, 1057, 1060.

"§ 1050. ACTION FOR POSSESSION. Any person, having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same, by action, to be brought against the tenant in possession."

"§ 1054. CONTENTS OF COMPLAINT. The plaintiff in his complaint, shall state that he is entitled to the possession of the premises, particularly describing them, the interest he claims therein, and that the defendant unlawfully keeps him out of possession."

"§ 1055. ANSWER IN DENIAL—EFFECT. The answer of the defendant, may contain a denial of each material allegation or statement in the complaint; under which denial the defendant shall be permitted to give, in evidence, every defense to the action, that he may have, legal or equitable."

"§ 1056. Where the defendant makes defense, it shall not be necessary to prove him in possession of the premises."

"§ 1057. The plaintiff must recover, on the strength of his own title."

"§ 1060. * The plaintiffs may recover against one or more of the defendants, the premises, *or any part thereof*, or interest therein, or damages according to the right of the parties; but the recovery shall not be for a greater interest than that claimed."

The declaration, in this case, claimed title in fee to all that part of lot 2, north and west of certain lines named. The defendant, in moving for an abstract of title, expressly grounded the motion upon the claim of title, to the specific parcel described in the declaration. The answer or plea put the title to that specific parcel in issue. In the language of the court above cited, "this was not a dispute about boundaries, but of title" (14 Pet., 333); the court could not judicially act on evidence as to boundaries, "for the pleadings do not put them in contestation." (9 Pet., 503.) There was no portion of lot 1 claimed. The location of the south line of Lot 1, the dividing line between Lots 1 and 2, was in no manner before the court. In this, also, the Indiana authorities agree with the authorities above cited.

We quote the language of their opinions:—

Applegate v. Doe (2 Ind. 169, p. 170.) "The defend-
"ant * having admitted that he was in possession
"of the lot sued for, there was but one question to be tried;
"and that was, whether or not the (plaintiff) had legal title
"to lot 105 or any part thereof?" * * *
"The evidence relative to the line between lot No. 105 and
"the adjoining one, was entirely irrelevant."

In Voltz v. Newbert, (17 Ind. pp. 190–1) it is said: This case is "*precisely in point*" (under the present statute) "be-
"cause proof of possession, in the defendant, being unneces-
"sary, the boundaries of the land described by the plaintiffs
"are in effect conceded, and evidence tending to prove
"their location must of course be deemed immaterial."

*Doe v. Hall*, (2 Ind. 24): Ejectment for the west half of lot 104, in the town of Connorsville. "The plaintiff gave
"in evidence a deed of the property described in the declar-
"ation, and there was further evidence given, tending to

"show a dispute between the parties, as to the location of "the boundary line of the premises sued for, and the adjoin- "ing lot; but as the defendant had confessed himself to be "in possession of the premises sued for, we do not see, if the "plaintiff proved title thereto, how the question about the "boundary could well be got before the court."

This is in harmony with the general law. Upon the pleadings in this case, the question of boundary could not be tried. The court had nothing to do with the location of the boundary.

Tongue v. Newall, 17 Md. 228–9.
Farrow v. Farrow, 2 J. J. Marshall, 388.
Games v. Stiles, 14 Peters, 333.
McQueen v. Lampley, 74 Ala. 408.

For concise statement, we omit the description of the fraction of lot 2 sued for. Then the plaintiffs, by their declaration, said: "We own lot 2. Defendant holds possession thereof, and keeps us out of possession." Defendant came into court, and (Rec. marg. p. 2) said: "The defendant "moves that the plaintiffs be ruled to file an abstract of "title, showing their alleged title *to said lands* (lot 2), to the "end that he (defendant) may be advised as to their pretended title to the lands in controversy" (lot 2). This practice is authorized by the Revised Statutes of Indiana (§ 363), and pursuant to the demand, plaintiffs filed their abstract, showing twelve conveyances of lot 2, through which they deraign title to lot 2 from the United States. (Printed Rec. p. 2.) Having thus caused it to be repeated over and over again, that plaintiffs are suing for and claiming to own lot 2, the defendant put in his answer, which in effect said: "I am in possession of lot 2. The plaintiffs do not own lot 2."

The law of the United States forbids equitable defenses to an action at law, and for the residue, the Indiana cases cited determine that the statute makes this answer a confession of possession and agreement to insist on title only.

The plaintiffs are citizens and residents of the State of New York, over 500 miles from the place of trial. The land is at the extreme northwest corner of Indiana, about 200 miles from Indianapolis, the place of trial. If upon the trial, the court sought to go into an investigation of the location of the boundary between lots 1 and 2, in the words of this court: "*it was illegally done.*" (Garland v. Davis, 4 How. 148.) Hence, presumption arises, that it made no such illegal investigation.

*The issue*, made by the pleadings, *was: whether the plaintiffs were the owners in fee simple, and entitled to the possession of that part of lot* 2 in Sec. 36, etc., lying north and west of certain lines. Plaintiffs assumed to prove the affirmative of that issue; for, both by common law and by the statute of Indiana, they must recover *on the strength of their own title.* (§ 1057.)

This issue the parties submitted to the court for trial.

## THE VERDICT OR FINDING.

"When the jury have delivered in their verdict, *and it is* "*recorded in court*, they are then discharged; *and so ends the* "*trial by jury.*" 3 Blackstone Com. 378.

"In a disputed case, *a verdict is simply the answer of a jury*, "to the court, *on the issues of fact committed to their examina-* "*tion.* A judgment is the conclusion, that flows from the "law, and the verdict of the jury."

Stennett v. Scott, 2 Eng. (7 Ark.) p. 281.

The verdict must respond to the issue joined, between the parties, to the action.

Patterson v. U. S., 2 Wheat., 221.
Garland v. Davis, 4 How. 131.
Middleton v. Quigley, 7 Halst. 352.
Holmes v. Wood, 6 Mass. 1.
Kilbourn v. Waterous, Kirby, (Conn.) 424.
Fenwick v. Logan, 1 Mo. 401.
Moody v. Keener, 7 Porter, (Ala.) 218.
Sawyer v. Fitts, 4 Stew. & Porter, 365.
Vines v. Brownrigg, 2 Dev. Law, 537.

In *Patterson v. The United States*, (2 Wheat. p. 225,) this court said: "The rule of law is precise upon this point. A "verdict is bad, if it varies from the issue in a substantial "matter, or if it find only part of that which is in issue. "The reason of the rule is obvious; *it results from the nature* "*and the end of pleading.* Whether the jury find a general "or a special verdict, it is their duty to decide the very "point in issue."

The statutes of Indiana, touching verdicts, are in accord with the common law, except that the Indiana form of the verdict is, in all cases, *for the plaintiff* or *for the defendant*, unless the jury render a special verdict.

Those statutes apply to *the form*, not to *the substance* of verdicts.

Indiana Revised Statutes, Sec. 545: "The verdict of a

"jury is either general or special. A general verdict, is "that by which they pronounce generally upon all or any "of the issues, either in favor of the plaintiff or defendant. "A special verdict is that by which the jury find the facts "only, leaving the judgment thereon to the court."

(This agrees with the common law. 3 Blackstone, Com. 377.)

On the effect of a verdict note: AN ISSUE *found by verdict shall always be intended true* until set aside:

Coke on Littleton, 227, b.
Prentice v. Zane, 8 How. 470, pp. 484–6.
Parkes v. Turner, 12 How. 43–4.

THE FORMS OF VERDICTS IN EJECTMENT have been settled for more than three hundred years, *according to the function* such verdicts are required to perform, in the administration of justice, on such issues. (See *Guy* v. *Rand*, below quoted.)

The forms of general verdict in ejectment are very simple and well understood. *Guilty. Not Guilty. Guilty as to a part* of the premises described in the declaration, and *not guilty as to the residue.* (*Gilbert on Ejectment*, 246.)

The verdict being thus delivered, is written down upon the record, according to its legal effect, by the clerk of the court, thus: "They" (the jury) "say they find the de-"fendant guilty of the trespass and ejectment wherewith he "is in said declaration charged."—"The said jurors declare "upon their oaths that the said defendant is guilty of the "trespass and ejectment wherewith he is in said declaration "charged, as to the east half of the lands in said declara-"tion described, but as to the residue of said lands, they "say that the defendant is not guilty." (*Gilbert on Ejectment*, 246.)

Like forms are given in ADAMS *on Ejectment*, 489, 490, and RUNNINGTON *on Ej.* 129, 495–6.

In TYLER (*on Eject.* p. 579), we read: "According to the "forms given in Runnington's old treatise on ejectment, the "plaintiff may take verdict for his term in certain premi-"ses, *describing them*, and the defendant have the verdict as "to other premises, *also describing them;* and such is always "the practice at common law, and *such is almost universally "the practice in the several states.*"

We copy the full entry from RUNNINGTON, p. 495: "As "to the 9 acres * part of the tenements specified in

"the within declaration, the said jurors declare upon their "oaths, that the said John Ladd is guilty of the trespass and "ejectment within written, in the 9 acres aforesaid, as the "said John Norton doth within complain against him; and "they assess the damages of the said John Norton by rea-"son of the said trespass and ejectment * to six "pence; and as to one garden, etc., other part of the tene-"ments specified in the within declaration, they declare, "upon their said oaths, that the said John Ladd is not guilty "of the within written trespass and ejectment in the said "one garden," etc.

It is to be observed that this is a solemn form, not only as to that part whereof the jury find the defendant guilty, but also as to that part whereof they find him not guilty. It is their deliberate judgment, upon their oaths, deliberately announced, as much as to one part of the land, as to the other part of the land.

*Guy* v. *Rand* Cro. Eliz. 13. "The plaintiff declared of an "ejectment of 100 acres of land, and showed his lease in "evidence only of 40 acres; and it was said he had failed of "his case, for there was no such lease as that of which he "did count. But it was ruled to be good for so much as "was comprised in his lease; and for the residue the jury "may find the defendant not guilty."

And judgment must be entered against the plaintiff as to that part of the land, whereof the jury find the defendant not guilty.

Smith v. Fuller, 2 Strange 786.
Tench v. Dalton, (*Citation*, ibid.)

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The judge below in his opinion, said: "It was competent "for the court, under the issue, to find *to what extent* the de-"fendant was guilty, or had held unlawful possession *of the* "*premises* described" (in the declaration); "and if, under "the evidence, it appeared that a fence, had become or was "the boundary of such occupation, it was proper that the "fact should be stated."

So he claims, that the fence named as on the south line of lot 1, is not named as a boundary of the land sued for, but as a division of the land sued for into two parcels, and he necessarily claims, that as to that portion of the land sued for, laying north of that fence, no verdict was given.

But observe: A verdict which is recorded for part of

the land sued for, and which says nothing as to the rest, is void.

Twice adjudged. Coke on Littleton, 227 a.
Wise v. Hine, 1 Green (Iowa), 62.
Auncelme v. Auncelme, Cro. Jac. 31.
Comyn's Digest *title* Pleader (S) 19.
Miller v. Trets, 1 Ld. Raym. 324.
Rex v. Hayes, 2 Ld. Raym. 1518, p. 1521.
Wood v. McGuire, 17 Georgia, 361.
Patterson v. U. S., 2 Wheaton, 225.
Prentice v. Zane, 8 How. 484.
Graham v. Bayne, 18 How. 60, p. 63.

When a jury is waived, and the finding or verdict of the court embraces only part of the issues, there can be no judgment.

Ex parte French, 91 U. S. 423.
Fort Scott v. Hickman, 112 U. S. 150, p. 165.
Graves v. Morely, 3 Levinz, 55.

"A venire facias de novo is grantable, when the verdict whether general or special is imperfect, by reason of some uncertainty or ambiguity (2 Ld. Raym. 1521, 1584; 2 Strange, 887, 1124; 2 Ken. 338; 5 Burr. 2669; 7 T. R. 52; 1 East, 111; 2 Bing. 262) or by finding less than the whole matter put in issue. (Cro. Jac. 31; 2 Ld. Raym. 1521–2; 4 Barn. & Cress. 69; 6 Dowl. & Ryl. 68; 2 Wm. Saunders, 5 Ed. 210, f. 211, [3].)"

2 Tidd Pr., 922, also 640.

In a special verdict nothing is to be intended.

2 Tidd Pr. 1239.

If a verdict only find part of what is in issue it is bad.

Bac. Abr. title Verdict (M).
1 Inst. 227.
Smith v. Raymond, Day, 189
Finnymore v. Stanley, Cro. Eliz. 133.

"In the *Chesapeake Ins.* Co. v. *Stark*, 6 Cranch, 268, and *Barnes* v. *Williams*, 11 Wheat. 415, this court have decided that where in a special verdict, the essential facts are not *distinctly found* by the jury, although there is sufficient evidence to establish them, the court will not render a judgment upon such an imperfect special verdict, but will remand the cause to the court below with directions to award a venire de novo." *Prentice* v. *Zane*, 8 How. (49 U. S.) 484.

A jury must pass on all the matters submitted, and can not find a verdict, on one part of the plaintiffs' demand, without deciding on the other, *such verdict is void.*

Rockway v. Kinney, 2 Johns. 210.
Van Benthuysen v. DeWitt, 4 Johns. 213.

In giving his opinion, Judge Woods guesses at what the record intended. The opinion was given while Judge Gresham was Postmaster General. As to the value of the guess, it makes no difference whether he talked with Judge Gresham or not; for Judge Gresham's judgment on the legal effect of that record is no better than that of any other man; and at the close of the term, when it was entered, it was no longer in his remembrance. (Co. Inst. 260, a.) A judge who has left the bench could hardly be called as a witness to testify to the legal effect of a record.

The statement of a judge on the bench is no more evidence to this court of the meaning of that record than the opinion of a layman. *Flanders* v. *Tweed*, 9 Wallace, 428.

To make the opinion logical, we must conclude the judge intended to add that he would presume that as to that part of the land lying north of that fence, the finding was intended to be, not guilty, or for the defendant.

Unless there is a distinction between a recorded verdict of a jury and a recorded finding by a judge, this cannot be. In *Prentice v. Zane* (8 How. p. 484), this court said: "A "verdict says, Coke (Co. Litt. 227, a) finding matter uncer- "tainly and ambiguously, is insufficient, and no judgment "will be given thereon.

"A verdict which finds but part of the issue, and *says* "*nothing as to the rest*, is insufficient, because the jury have "not tried the whole issue. So if several pleas are joined, "and the jury find some of them well, and as to others find "a special verdict, which is imperfect, a *venire facias de* "*novo* will be granted for the whole. (2 Roll. Abr. 722, pl. "19; Auncelme v. Auncelme, Cro. Jac. 31; Woolmer v. "Caston, Cro. Jac. 113; Treswell v. Middleton, Cro. Jac. "653; Rex v. Hayes, 2 Ld. Raym. 1518.)"

The same doctrine was stated in *Patterson v. U. S.*, 2 Wheat. 224, and in *Garland v. Davis*, 4 How. p. 147, and is doubtless as much the law to-day, as it was in the time of the first James. The District Judge, in his opinion, would not only strike out a good verdict *for the plaintiffs*, but would stultify Judge Gresham, as to the residue, presuming that he rendered such a verdict as had been forbidden from the origin of such trials. (1 Archbold, Pr. 315; 1 Ld. Raym. 324; 2 Wheat. 221; 4 How. 131; 7 Halst. 352; 6 Mass. 1; Kirby,

424; 1 Mo. 401; 7 Port. 237; 4 Stew. & Port. 365; 2 Dev. Law. 537; 1 Green, Iowa, 62.)

Looking at the entry in the light the judge would present it in his opinion, but without striking out the finding *for the plaintiffs*, we apply again the authority of Coke, which this court has so often approved: "If the jury give "a verdict of the whole issue and of more, &c., *that which* "*is more is surplusage* and shall not stay judgment; *for utile* "*per inutle non vitiatur.*"

COKE *on Littleton*, 227 a.

*Patterson v. U. S.*, 2 Wheat. 225.

Bacon's Abridgement, *title* Verdict (N).

Surplusage in a verdict shall be rejected. (COMYN'S Digest *title* Amendment.)

If a verdict finds matter out of the issue it is void for so much.

Foster v. Jackson, Hobart, 53–4.

Bracebridge v. Case, 1 Leonard, 66.

Comyn's Digest, *title* Pleader (S). 28.

If the jury find matter beyond the issue tried, it must be rejected as surplusage.

Richmond v. Talmadge 16 Johns. 307.

By all analogies of the common law, and by the object of *pleadings*, and trial of written *issues*, the submission for trial is the same, whether to a jury, to the court in place of a jury, or to arbitrators, viz.: In *York & C. R. R. Co.* v. *Myers*, 18 How. 252, this court affirmed:

"The law is well settled that by reference of an action to an arbitrator, nothing is included in the submission but the subject matter involved in it. (*Tidds' Practice*, 822; 2 Term Reports, 645.) And if an arbitrator embraces in his award matter not submitted, and includes the result in a single conclusion, so as to render it impossible to separate the matters referred from those which have not been, the award is bad. Lyle v. Rodgers, 5 Wheat. 394; 33 Maine, 219; Sawyer v. Treeman, 35 Maine, 546."

Such is in all cases the law, and the implied contract of submission of the case for trial; and if the award, finding or verdict is an honest response to the duty thus assumed, it is the end of the trial, otherwise it is a mistrial.

If the function of the judge, in making his finding on an *issue* at common law submitted to him, and the function of

the clerk, in entering that finding on the record, do not vary from the function of a jury, in rendering verdict, and the function of the clerk, in entering that verdict on the record, there is no doubt on the legal effect of the record under examination.

On this point the provisions of the local statutes of Indiana, are as follows:

"§ 551. SPECIAL FINDING BY COURT. Upon trials of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally *for the plaintiff or defendant* unless one of the parties request it, with a view of excepting to the decision of the court, upon the questions of law involved in the trial; in which case the court shall *first* state the facts in writing, and *then* the conclusions of law upon them, and judgment shall be entered accordingly."

"§ 552. The provisions of this Code respecting trials by jury, apply, so far as they are applicable, to trials by the court."

"§ 564. When a trial by jury has been had, and a *general verdict rendered, the judgment must be in conformity to the verdict.*"

"§ 565. When the verdict is special, or *where there has been a special finding on particular questions of fact,* the court shall render the proper judgment."

It is decided and determined by the Supreme Court of Indiana, that a finding by the court, not made at the request of either or any of the parties, and which is not signed by the judge, is not a special finding. *Northcutt v. Buckles,* 60 Ind. 577; *Caress v. Foster,* 62 Ind. 145.

The sections quoted show that the Indiana legislature intended to require rigid adherence to those steps which the common law had incorporated into common law trials, affording landmarks at which the rights of each party would be adjusted with certainty. They show that by the local law the judge is as certainly required to find a general verdict or a special verdict, *separate* from the decision of law thereon, as though a jury made the finding; and that the judgment record, under consideration, has no quality of a special finding under the Indiana law.

*But the case under consideration was tried in a Circuit Court of the United States;* and the action of the court, and its officers, are governed by the laws of the United States. Those laws are very explicit.

United States R. S., § 648. "*The trial* of issues of fact, in

"the Circuit courts, *shall be by jury*, except" in the cases named.

§ 649. "Issues of fact, in civil cases, in any Circuit "Court, *may be tried* and determined by the court, without "the intervention of a jury. * * The finding of "the court upon the facts, which may be either general or "special, *shall have the same effect as the verdict of a jury.*"

§ 700. "When an issue of fact, in any civil case, in a "Circuit Court, is tried and determined by the court, with- "out the intervention of a jury, according to section 649, "the rulings of the court in the progress of the trial of the "cause, if excepted to at the time, and duly presented by "a bill of exceptions, may be reviewed by the Supreme "Court, upon a Writ of Error or upon Appeal; and when "the finding is special, the review may extend to the de- "termination of *the sufficiency of the facts found*, to support "the judgment."

§ 987. "When a Circuit Court *enters judgment* in a civil "action, either upon a verdict, *or on a finding of the court* "upon the facts, *in cases where such finding is allowed*" etc.

These laws can not be applied, if the whole can be thrown into hotchpot, as the judge below would claim to be proper.

Sec. 987, treats the finding of the court, upon the issue of fact, as distinct from the judgment entered thereon, as the verdict of a jury necessarily is. It speaks of cases where such a finding is allowed. Sec. 648, is mandatory that the trial of issues of fact *shall be by jury*, except in the case where they *may be tried* and determined by the court. Here is a permission,— a certain class of cases in which "such find- ing is allowed." Then the mandatory character is resumed: "the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury" (§ 649).

This reference of section 649 to a general or special find- ing upon issues of fact, has reference to general and special verdicts of juries. This is apparent, by the language of the section, giving such findings the same effect; it is made more apparent by section 700, where it is provided that when the finding is special, the review may extend to the deter- mination of the sufficiency of the facts found, to support the judgment.

## The Finding of the Judge is a Verdict.

The finding of a single judge is equivalent to *the verdict* of a jury. *Sisson* v. *Barrett*, 2 Comstock (New York) 406.

Of a case tried by a court without a jury before the statute of 1865, this court said: "*The court was substituted for a jury*, by consent of the parties, in a trial at law." *Phillips* v. *Preston*, 5 How. 290. Statements like this doubtless entered into the minds of the Congress in enacting the present laws.

On the argument of the suit for mandamus on this record (Ex parte Morgan, 114 U. S. 174) I used the word verdict, as applicable to cases where a jury is waived as well as to cases tried by a jury. I thought Mr. Justice Miller intimated that I spoke the word parrot-like, without comprehension of its real significance. My recollection is that the Chief Justice seemed also to dissent from my application of the word.

Having carefully reviewed the cases, I am satisfied that the *finding* of the judge is to stand in the record as a common law *verdict*, without any qualification in the use of the word.

Dictionaries do not confine the word to the finding of a jury, though the dictionary definition would not justify its use to express the decision of the judge on an issue of fact, if such decision was not by the law the same thing as a verdict in every substantial requisite and result.

It is to be observed, upon the decisions of this court, that the finding is always therein treated as a verdict, whether the jury has been waived by writing or orally; that the only difference made by the written submission is, that it allows questions arising in the progress of the trial to be presented for review by bill of exceptions, whereas oral submission does not.

Points of identity in the finding of the judge with the verdict of a jury are as follows:

(1) The finding must be responsive to the issue, and must find all the issues, otherwise this court will order a venire de novo because of mistrial.

A. D. 1855. Guild v. Frontin, 18 How. 135.

(2) Judgment upon a finding by the court, must be reviewed in this court according to the principles of the common law, as if the finding of the judge was the verdict of a jury.

A. D. 1855. Graham v. Bayne, 18 How. 60.
A. D. 1868. Insurance Co. v. Tweed, 7 Wal. 44.
Miller v. Life Ins. Co., 12 Wal. 285.
Dirst v. Morris, 14 Wal. 484.
Ins. Co. v. Folsom, 18 Wal. 237.
Boogher v. Ins. Co., 103 U. S. 90.
Bond v. Dustin, 112 U. S. 604.
Martinton v. Fairbanks, 112 U. S. 670.

(3) In such case *the court sits in place of a jury.* By permission of the parties *the court takes the place of the jury.* Its finding of facts is *precisely as if the jury had found them by verdict.*

Craig v. Missouri, 4 Peters, 410.
U. S. v. King, 7 How. p. 844.
Weems v. George, 13 How. 190.
Bassett v. U. S., 9 Wal. 38.
Copelin v. Ins. Co., 9 Wal. 461.
Norris v. Jackson, 9 Wal. 125.
Coddington v. Richardson, 10 Wal. 516.
Miller v. Life Ins. Co., 12 Wal. 285.
Ins. Co. v. Folsom, 18 Wal. 237.
Town of Ohio v. Marcy, 18 Wal. 552.
Bond v. Dustin, 112 U. S. 604.
Martinton v. Fairbanks, 112 U. S. 670.
Allen v. St. Louis Bank, 120 U. S. p. 30.

(4) Statutes that apply *only* to verdicts, apply to findings of the court in such cases.

Bond v. Dustin, 112 U. S. 604.

(5) The form and substance of the decision on the issues of fact, whether the waiver of the jury is oral or in writing, is (by statute or by necessary implication from the waiver) required to be precisely the same as the verdict of a jury.

Norris v. Jackson, 9 Wal. 125.
Miller v. Life Ins. Co. 12 Wal. 285.
Dirst v. Morris, 14 Wal. 484.
City of Richmond v. Smith, 15 Wal. 429.
Dickinson v. The Planters' Bank, 16 Wal. 250.
Ins. Co. v. Folsom, 18 Wal. 237.

Bond v. Dustin, 112 U. S. 604.
Martinton v. Fairbanks, 112 U. S. 670.

(6) The finding of the judge in a case where a jury is waived *belongs to the record*, as fully as does the verdict of a jury. *There must be a finding* of fact, *either general or special*, in order to authorize a judgment, and *that finding must appear on the record.*

Ætna Ins. Co. v. Boon, 95 U. S. 117.
Miller v. Life Ins. Co., 12 Wal. p. 295.
City of Richmond v. Smith, 15 Wal. 429.

(7) The finding so recorded, has *the same effect* as the verdict of a jury.

Guild v. Frontin, 18 How. 135.
Graham v. Bayne, 18 How. 60.
Bassett v. U. S., 9 Wal. 38.
Norris v. Jackson, 9 Wal. 125.
Copelin v. Ins. Co., 9 Wal. 461.
Coddington v. Richardson, 10 Wal. 516.
Miller v. Life Ins. Co., 12 Wal. 285.
City of Richmond v. Smith, 15 Wal. 429.
Ins. Co. v. Folsom, 18 Wal. 237.
Bond v. Dustin, 112 U. S. 604.
Martinton v. Fairbanks, 112 U. S. 670.
Allen v. St. Louis Bk., 120 U. S. 30.

There are many other points of identity which will appear from the following review of the cases above cited and several others.

*It is impossible that a finding of a judge shall have the same effect as the verdict of a jury unless the finding has the same function, the same place in the record, and the same force and result, not only in those particulars which have been named by this court but in every other particular possible.*

Again: Appellate jurisdiction has been given to this court by the constitution; the congress has not excepted cases, which have been tried by the court, or provided any rule for review, other than those provided by the common law, for review of those cases where the verdict is by a jury. From Craig v. Missouri, in 4th Peters to Bond v. Dustin, 112 U. S. (both cases submitted without writing) the review has been under the same rules as if the finding had been the verdict of a jury.

Under all these circumstances of complete and entire identity we claim that where the record under review is perfect and strictly regular down to and including the general verdict, according to the course, and in conformity in every respect with the forms and methods of proceeding at the common law, this court is bound to give to it the effect that the common law gives it.

The following are the cases:

In *Guild* v. *Frontin*, 18 How. 135, in 1855 long before the statute of 1865 for trial by the court, this court called the finding of the court, in such case, a *verdict*, thus: "Parties may, by consent waive a trial of issues of fact by a jury, and submit the trial of both facts and law to the court. It will not be a mis-trial. But if they wish the judgment of the court to be reviewed on a writ of error, *a special verdict*, or agreed statement of facts must be put on record. The issues of fact must be ascertained and made certain, before a court of error can review the decision of an inferior court. If *the verdict* do not find all the issues, or the agreed statement, in the nature of a special verdict be imperfect or incomplete, this court may order a venire de novo because of the mis-trial.

In *Graham* v. *Bayne*, 18 How. 60, the court determined that cases submitted to the court for trial, must be reviewed in this court according to the principles of the common law. That is, the judgment must be tried upon an agreed case stated, made part of the record, in the nature of a special verdict, or on *the verdict* of the judge.

*Insurance Co.* v. *Tweed*, 7 Wallace, 44, argued January 6, 1868, held under advisement for more than a year and decided January 25, 1869, seems to be the first case declaring the effect of the act of 1865, authorizing trial by the court, on waiver of a jury. The case was from Louisiana.

The opinion was delivered by Mr. Justice MILLER. In it the court said: "On account of the peculiarity in practice in that state, it has been decided in several cases, coming from the state courts of Louisiana to this court by writ of error, that we would regard the statements of fact found in the opinions of the court as part of the record, where they were in themselves sufficient and otherwise unobjectionable. And perhaps this may in practice have been extended to cases from the federal courts of that district. But in regard to the latter *we are not now at liberty to do so*. The act of March 3, 1865 (13 Stat. 501), by its fourth section provides a clear and simple mode by which parties who submit cases to the court, without the intervention of

the jury, may have the rulings of the court reviewed here, and also prescribes what may be reviewed in such cases. This statute, *which is but a reproduction of the system in practice in many of the states*, is as binding on the federal courts sitting in Louisiana as elsewhere, and *we can not disregard it*."

*Bassett* v. *United States*, 9 Wallace, 38, Mr. Justice MILLER delivered the opinion of the court (p. 40): When a court *sits in place of a jury*, and finds the facts, this court can not review the finding. If there is any error in such case, shown by the record, in admitting or rejecting testimony, it can be reviewed here. But *when the court by permission of the parties takes the place of the jury*, its finding of facts is conclusive, *precisely as if the jury had found them by verdict*."

*Norris* v. *Jackson*, 9 Wall. 125, decided Feb. 21, 1870, was the next case. The opinion is also by Mr. Justice MILLER. In it the court said: "This is an action of *Ejectment* tried in the Circuit Court, for the Northern District of Illinois, by the court, to whom it was submitted without a jury."

"By section 4, of the Act of March 3, 1865 (13 Stat. 50), it is provided, that parties may submit the issues of fact in civil cases to be tried and determined by the court, without the intervention of a jury; and it declares what the effect of such finding shall be, and how and under what circumstances there may be a review of such judgment."

After copying the statute the opinion proceeds:

"The first thing to be observed in this enactment is, that it provides for two kinds of findings in regard to the facts, to-wit: general and special. This is in perfect analogy to *the findings by a jury, for which the court is in such cases substituted*, by the consent of the parties. In other words, *the court finds a general verdict*, on all the issues, *for plaintiff* or defendant, or *it finds a special verdict*."

"This special finding has often been considered and described by this court. It is not a mere report of the evidence, but a statement of the ultimate facts, on which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest. Burr v. DeMoines Co., 1 Wall. 99; Graham v. Bayne, 18 How. 62."

"The next thing to be observed is, that whether the finding be general or special, *it shall have the same effect as the verdict of a jury*. That is to say it is conclusive as to the

facts so found. *In the case of a general verdict,* which includes or may include, as it generally does, mixed questions of law and fact, *it concludes both,* except so far as they may be saved by some exception, which the party has taken to the ruling of the court on the law.

In the case of *a special verdict,* the question is presented as it would be if tried by a jury, whether the facts thus found require a judgment for plaintiff or defendant; and *this being matter of law; the ruling of the court on it can be reviewed in this court on that record.* If there were such *special verdict* here, we could examine its sufficiency to sustain the judgment."

* * * * * *

"We have taken some pains to comment on the mode in which cases tried by the court, which are properly triable by a jury. may be reviewed here. Attention was called to the statute of 1865, in the case of Insurance Co. v. Tweed, 7 Wall. 44, and we here condense the results of an examination of that statute:

1. *If the verdict be a general verdict,* only such rulings of the court, in the progress of the trial, can be reviewed as are presented by bill of exceptions, or as may arise on the pleadings.

2. In such cases a bill of exceptions cannot be used to bring up the whole testimony for review, any more than in a trial by jury.

3. That if the parties desire a review of the law involved in the case, they must either *get the court to find a special verdict,* which raises the legal propositions, or they must present to the court their propositions of law, and require the court to rule on them."

*Copelin* v. *Insurance Company,* 9 Wallace, 461. Page 462: "The cause having been submitted to the court without a jury, the court found," etc. Page 464: "Mr. Justice STRONG delivered the opinion of the court. Nothing in this record requires us to look beyond the special finding of the facts made by the court, or to do more than determine whether, upon the facts found, the plaintiff below was entitled to the judgment given."

Page 467: "Our judgment is necessarily founded, exclusively, upon the finding of facts by the court. *That is equivalent to a special verdict;* and upon that we think the plaintiff below was entitled to the judgment which he obtained."

*Coddington* v. *Richardson* (A. D. 1871,) 10 Wallace, 516, was a writ of error to the Circuit Court of the United States

for the Southern District of Illinois. The action was trover Senator Trumbull, counsel for defendant in error, said: "On such a record, one is at a loss to know what there is for the court to consider. The declaration is in the usual form; all the proceedings appear to be regular, and the finding of the facts by the circuit court, like the verdict of the jury, is conclusive here; and whether the fact was rightly decided or not, according to the evidence, is not open to inquiry in this court." In an opinion by Mr. Justice NELSON, the court stated the verdict to be in these words: "And the court thereupon found the issue for the plaintiff and assessed his damages at the sum of $5,000." Which finding this court held to have the effect of a common law verdict.

*Generes* v. *Campbell* (A. D. 1871), 11 Wall. 193. The action was at law against defendant as endorser of a promissory note. The court in an opinion by Mr. Justice SWAYNE said: "The parties, pursuant to the Act of Congress of March 3d, 1865, filed a written stipulation waiving a jury and the cause was tried by the court." On the effect of the bill of exceptions the court said: According to the statute *the finding of the court stands as would the general verdict of a jury*, and has the same effect. *The plaintiff in error is in the same position as if* he were here complaining that *the jury* erred in overruling the points and propositions which were argued to them in his behalf and *had found for the plaintiff*, when they should have found for the defendant. The evidence was closed, and *the court was sitting in place of a jury*, when his exceptions were taken."

*Miller* v. *Life Insurance Company*, 12 Wallace, 285. Page 295: "Mr. Justice CLIFFORD delivered the opinion of the court. Issues of fact, in civil cases pending in the circuit courts, may be tried and determined by the court without the intervention of a jury, whenever the parties or their attorneys of record file a stipulation in writing, with the clerk of the court, waiving a jury. *Such a submission necessarily implies that the facts shall be found by the court*, and the act provides that the finding may be either general or special, and that it shall have the same effect as the verdict of a jury in a case where no such waiver is made."

Page 296: "Most of the difficulty arising in the case proceeds from the failure of the court to comply strictly with the requirements of the act of Congress, which provides that issues of fact in civil cases may be tried and determined by the court without the intervention of a jury.

Where a jury is waived, as therein provided, and the issues of fact are submitted to the court, the finding of the court may be either general or special, as in cases where an issue of fact is tried by a jury; but where the finding is general, the parties are concluded by the determination of the court, except in cases where exceptions are taken to the rulings of the court in the progress of the trial."

Page 297: "By the express words of the act the finding may be general or special, but *if general it is final* and conclusive between the parties, unless the court which tried the case shall grant a new trial or the judgment shall be reversed in the appellate court for some erroneous ruling made in the progress of the trial, which is duly presented by a bill of exceptions. Whether the finding is general or special, the rulings of the court in the progress of the trial, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed in this court, and in case where the finding is special the review may also extend to the determination of the question whether the facts found are sufficient to support the judgment."

(Page 299.) "Suppose the facts proved to have been as assumed by the defendants in their requests, then it might well be conceded that the judgment was for the wrong party, but the issues (p. 300) of fact were tried and determined by the circuit court, and the act of Congress provides, that the finding of the circuit court in such cases shall have the same effect as the verdict of a jury, and the Constitution provides that no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law. Facts, so tried, could only be re-examined, under the rules of the common law, either by the granting of a new trial by the court where the issue was tried or to which the record was returnable, or by the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings. Matters of fact found by the circuit court under such a submission cannot be re-examined here, as, by the express language of the act, the review, when the finding is general, is confined to the rulings of the court in the progress of the trial, and even when the finding is special nothing else is open to review except the inquiry, whether the facts found are sufficient to support the judgment."

(Page 301.) "Inferences of fact must be drawn by the circuit court, which, by the agreement of the parties, is

substituted for a jury, and cannot be drawn by this court, which sits as a court of errors."

*Dirst* v. *Morris*, 14 Wallace, 484 (Ejectment. Northern District of Illinois). Mr. Justice BRADLEY delivered the opinion of the court. Page 491: "Had the law which authorizes the waiver of a jury, allowed the parties to require a special finding of the facts, then the legal questions could have been raised, and presented here upon such findings, as upon a special verdict. But, as the law stands, if a jury is waived and the court chooses to find generally for one side or the other, the losing party has no redress or error, except for the wrongful admission or rejection of evidence."

*City of Richmond* v. *Smith*, 15 Wallace, 429. Mr. Justice CLIFFORD delivered the opinion of the court. Page 437: "Issues of fact in civil causes pending in the Circuit Courts may, if the parties so agree, be tried and determined by the court, without the intervention of a jury, but *such a submission necessarily implies that the facts shall be found by the court*, and the act provides that the finding may be either general or special, and that it shall have the same effect as the verdict of a jury."

*Dickinson* v. *The Planters Bank*, 16 Wallace 250. Mr. Justice STRONG delivered the opinion of the court (p. 256). "It is very clear that in this case there was no special finding of facts upon which any judgment for the plaintiff could have been rendered." Page 257: "Some facts, indeed, are stated in *the opinion of the court, that seems to have accompanied the judgment*, but they are not stated as a special finding. They are rather advanced as reasons why the judge came to the conclusion that the alleged promise of the defendants had not been proved. It is impossible to regard anything that appears in this case as equivalent to a special verdict."

*Insurance Company* v. *Folsom*, 18 Wallace, 237. Mr. Justice CLIFFORD delivered the opinion of the court: Page 248. "By the terms of the act of Congress permitting issues of fact in civil cases to be tried and determined by the court without the intervention of a jury, it is provided that the finding of the court upon the facts may be either general or special, and that the finding shall have the same effect as the verdict of a jury. When the jury is waived as therein provided, and the issues of fact are submitted to the court, the finding of the court may be either general or special, as in cases where an issue of fact is tried by a jury; but *where the finding is general the parties are concluded* by the

determination of the court, except in cases where exceptions are taken to the rulings of the court in the progress of the trial."

"Facts found by a jury could only be re-examined under the rules of the common law, either by the granting of a new trial, by the court where the issue was tried, or to which the record was returnable, or by the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings. (2 Peters 448; Story on the Constitution § 1770.)"

"All matters of fact, under such a submission, must be found by the circuit court, and not by the Supreme Court, as the act of Congress provides that the issues of fact may be tried and determined by the circuit court where the suit is brought. Inferences of fact must also be drawn by the circuit court, as it is the circuit court and not the Supreme Court, which *by the agreement*, of the parties, is *substituted for a jury*."

"*None of these rules are new, as they were established by numerous decisions of this court, long before the act of Congress in question was enacted.* Bond v. Brown, 12 How. 254; Penhallow v. Doane, 3 Dallas, 102; Wiscart v. Dauchy, 3 Dal. 327; Jennings v. Brig Perseverence, 3 Dal. 336; Talbot v. Seeman, 1 Cranch, 38; Saulet v. Shepherd, 4 Wal. 502; Faw v. Robendeau, 3 Cranch, 177; Dunlap v. Munroe, 7 Cranch, 270; United States v. Casks, 1 Peters, 550; Hyde v. Booream, 16 Peters, 176; Archer v. Morehouse, Hempstead, 184; Parsons v. Bedford, 3 Peters, 434; Craig v. Missouri, 4 Peters, 427; United States v. King, 7 Howard, 853.

"Propositions of fact found by the court, in a case where the trial by jury is waived, as provided in the act of Congress, are equivalent to a special verdict, and the Supreme Court will not examine the evidence on which the finding is founded, as the act of Congress contemplates that the finding shall be by the circuit court; *nor is the circuit court required to make a special finding*, as the act provides that the finding of the circuit court may be either general or special, and that it shall have the same effect as the verdict of a jury. (9 Wall. 461; 9 Blatchford, 201.) Where a case is tried by the court without a jury, the bill of exceptions brings up nothing for revision except what it would have done had there been a jury trial."

"Issues of fact, however, under such a submission, are to be tried and determined by the circuit court, and it is equally clear that the findings of the circuit court, even when

special, cannot be reviewed by the Supreme Court, except for the purpose of determining whether the facts found are sufficient to support the judgment, as the express provision is that the finding of the circuit court in such case shall have the same effect as the verdict of a jury. Ins. Co. v. Tweed, 7 Wall. 51; Generes v. Bonnemer, 7 Wall. 564; Norris v. Jackson, 9 Wall. 125; Flanders v. Tweed, 9 Wall. 428; Dirst v. Morris, 14 Wall. 490; Richmond v. Smith, 15 Wall. 429; Bethell v. Matthews, 13 Wall. 2."

"Exceptions are allowed to the rulings of the court in the progress of the trial, and the provision is, that the review, if the finding is special, may also extend to the determination of the sufficiency of the facts found to support the judgment. Where the finding is general, as in this case, nothing is open to review but the rulings of the court in the progress of the trial, and as none of the last named exceptions, which are the ones now under consideration, were of that class, they are all overruled. Like a special verdict, a special finding furnishes the means of reviewing such questions of law arising in the case as respect the sufficiency of the facts found to support the judgment; but, where the finding is general, the losing party cannot claim the right to review any questions of law arising in the case, except such as grow out of the rulings of the circuit court in the progress of the trial, which do not in any proper sense include the general finding of the circuit court, nor the conclusions of the circuit court embodied in such general finding, as *such findings are in the nature of a general verdict, and constitute the foundation of the judgment.*

"*No review of such a finding can be made here,* under a writ of error, *unless it is accompanied by an authorized special statement of the facts,* without imposing upon this court, the duty of hearing the whole case, law and fact, as on an appeal in a chancery or in an admiralty suit, which could operate as a repeal of the provision in the act of Congress, that issues of fact in such cases may be tried and determined by the circuit court, and would also violate the clause of the 22d section of the judiciary act, which prohibits this court from reversing any case *for any error in fact.* 1 Stat. at L. 85."

"Whether any ruling of the circuit court, other than the rulings in admitting or rejecting evidence can properly be regarded as rulings in the progress of the trial, within the meaning of that phrase in the act of Congress, it is not necessary in this case to decide, as it is clear that neither the general finding of the circuit court, nor the

conclusions of the circuit court as embodied in the general finding, fall within that category."

*In the Town of Ohio v. Marcy*, 18 Wall. 552, the case was like the last and the conclusion the same.

*Insurance Co.* v. *Sea*, 21 Wall. 158. Error to the Circuit Court of the U. S. for the Northern District of Illinois. Mr. Chief Justice WAITE delivered the opinion of the court: "This was an action upon a policy of insurance. On the trial a jury was waived, and the cause submitted to the court under the provisions of the act of March 5, 1865, 13 Stat. at Large, 501. The plea was the general issue, with a stipulation by the parties that the defendant might offer any and every matter in evidence under it, with the like effect, as though such matters had been specially pleaded.

"There was a general finding for the plaintiff, *and judgment accordingly*."

* * *

"Much protracted litigation attended the settlement of mere questions of practice, under the act passed in 1824, 4 Stat. at L. 62, authorizing the trial of issues of fact by the courts of the United States, with the consent of parties, in Louisiana. To avoid a like experience, under the act of 1865, 13 Stat. at L., 501, it was deemed important by this court *to settle the practice* under it, at an early day, *with a precision and distinctness that could not be misunderstood*, and to require, in all cases, where the parties saw fit to avail themselves of the provisions of the act, a reasonably strict compliance with its provisions. Flanders v. Tweed, 9 Wall. 430. Accordingly, as early as 1869, in the case of Norris v. Jackson, 9 Wall. 125, after a very careful examination of the provisions of the act, the following construction was given to it."

The opinion then gives the conclusions of Norris v. Jackson, and cites the cases above quoted, saying: "The construction of the statute and the practice under it have also been brought to the attention of the court in Bassett v. U. S." (and so on, naming the cases) "and it can certainly be said that in no one of these cases has there been any relaxation of the rules *originally announced*. The practice having thus been distinctly and positively settled, it remains to consider its application to this case."

*Ætna Ins. Co.* v. *Boon*, 95 U. S. 117. Mr. Justice STRONG delivered the opinion of the court. In it he said: "The Act of Congress which authorizes trials by the court, 13 Stat. at L., 500, §§ 649, 700, R. S., has enacted that the find-

ing of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury; and that when the finding is special, the review by the Supreme Court upon a writ of error, may extend to the determination of the sufficiency of the facts found to support the judgment. No bill of exceptions is required, or is necessary, to bring upon the record the findings, whether general or special. *They belong to the record as fully as do the verdicts of a jury.* If the finding be special, it takes the place of a special verdict, and when judgment is entered upon it, no bill of exceptions is needed to bring the sufficiency of the finding up for review. *But there must be a finding of facts, either general or special, in order to authorize a judgment, and that finding must appear on the record.*"

In the case of *The Abbotsford*, 98 U. S. 440, the statutes and decisions, on trial by the court, were detailed at considerable length, but as that was an admiralty case, the matter stated was by way of illustration, and though the matter stated probably expresses the views of the members of the court, and is in harmony with the views we are advocating, we can not quote it as matter of decision.

*Kahn* v. *Smelting Company*, 102 U. S. 641, was an equity cause. Being tried in Utah, where the practice requires a finding on the issues of fact, though the findings by a master or a jury are considered as merely advisory, this court examined the findings "to see whether they meet the issues raised by the pleadings, and support the decree." (P. 644.)

It appears that the court delivered its findings Nov. 21, 1877, and judgment upon them was entered the same day. Fourteen days after the entry of judgment, the Judge filed further findings of fact. These were stricken from the transcript, and this court held that they were properly so stricken out (p. 664). The reporter's note is: "Where, under the practice established in Utah, issues are tried by the court, its findings of fact should be announced and filed before the entry of the judgment."

In *Boogher* v. *Insurance Co.*, 103 U. S. 90, it was held that where the law is such that the court has authority to refer a case, upon consent in writing only, an order expressed to be made "by consent of parties" will be presumed to have been made on written consent.

In *United States* v. *Harris*, 106 U. S. 634–5, it was held that where a jury was waived, the case is not withdrawn from the court, is not an arbitration, but is a judicial proceeding to be re-examined in this court as a court of

appellate jurisdiction, by reason of the appellate jurisdiction vested in this court by the constitution, according to the principles of the common law.

In *Bond* v. *Dustin*, 112 U. S. 604, Error to the Circuit Court of the United States for the Southern District of Illinois, the opinion was delivered by Mr. Justice GRAY: "The first question to be determined is how far this court, upon this record, has authority to consider the alleged errors. By the Act of March 3, 1865, Ch. 86, § 4, re-enacted in the Revised Statutes, it is provided that issues of fact in civil cases may be tried and determined by the Circuit Court without the intervention of a jury, whenever the parties, or their attorneys of record, file a stipulation in writing with the clerk of the court, waiving a jury; that the finding of the court upon the facts shall have the same effect as the verdict of a jury; and that its rulings in the progress of the trial, when excepted to at the time and presented by bill of exceptions, may be reviewed by this court upon error or appeal. 13 Stat. 501; Rev. Stat. §§ 649, 700.

"Before the passage of this statute, it had been settled by repeated decisions that in any action at law in which the parties waived a trial by jury and submitted the facts to the determination of the circuit court upon the evidence, *its judgment was valid; but that this court had no authority to revise its opinion upon the admission or rejection of testimony, or upon any other question growing out of the evidence* and therefore when no *other error appeared on the record*, must affirm the judgment. Guild v. Frontin, 18 How. 135; Kelsey v. Forsyth, 21 How. 85; Campbell v. Boyreau, 21 How. 223. The reason for this as stated by Chief Justice Taney in Campbell v. Boyreau was, that '*by the established and familiar rules and principles which govern common law proceedings* no question of law can be reviewed and re-examined in an appellate court upon writ of error (*except only where it arises upon the process, pleadings or judgment, in the cause*), unless the facts are found by a jury, by a general or special verdict, or are admitted by the parties upon a case stated, in the nature of a special verdict, stating the facts and referring the questions of law to the court.' 21 How. 226. Even in actions duly referred by rule of court, to an arbitrator, only rulings and decisions in matter of law, *after the return of the award*, were reviewable. Thornton v. Carson, 7 Cr. 596, 601; Alexandria Canal v. Swann, 5 How. 83; York & C. R. R. Co. v. Myers, 18 How. 246; Heckers v. Fowler, 2 Wall. 123.

"Since the passage of this statute it is equally well settled by a series of decisions that this court cannot consider the correctness of the rulings at the trial of an action by the circuit court, without a jury, unless the record shows such a waiver of a jury as the statute requires, by stipulation in writing, signed by the parties or their attorneys, and filed with the clerk. Flanders v. Tweed, 9 Wall. 425; Kearney v. Case, 12 Wall. 275; Gilman v. I. & M. T. Co., 91 U. S. 603, 614; Madison Co. v. Warren, 106 U. S. 622; Alexander Co. v. Kimball, 106 U. S. 603, note. In Flanders v. Tweed, Mr. Justice Nelson quoted the passage just cited from the opinion of Chief Justice Taney in Campbell v. Boyreau, and said that when a trial by jury had been waived, but there was no stipulation in writing, *no finding of the facts*, and no question upon the pleadings, the judgment must, according to the course of proceedings in previous cases, be affirmed, unless under very special circumstances, this court otherwise ordered. 9 Wall. 429, 431.

"The most appropriate evidence of a compliance with the statute is a copy of the stipulation in writing filed with the clerk. But the existence of the condition, upon which a review is allowed is sufficiently shown by a statement, in the finding of facts by the court, or in the bill of exceptions, or in the record of the judgment entry, that such a stipulation was made in writing. Kearney v. Case, 12 Wall. 283, 284; Dickinson v. Planters Bank, 16 Wall. 250. So it has been held that a written consent of the parties, after a trial by jury has begun, to withdraw a juror and refer the case to a referee, in accordance with the statute of a state, authorizing this course, is a sufficient stipulation in writing waiving a jury." (*Note:* the U. S. statute allows the writing effect only when it provides in terms or by necessary implication for trial by *the court* not by a referee.) "And that when the court has authority to refer a case upon consent in writing only, an order expressed to be made 'by consent of the parties,' that the case be referred, necessarily implies that such consent was in writing. Boogher v. Ins. Co., 103 U. S. 90; see also U. S. v. Harris, 629, 634, 635." (*Note:* under the doctrine just stated, if the record shows that the parties waived a jury and submitted the case to be tried by the court since the passage of sections 649, 700, 987, of the Revised Statutes of the United States, and since those sections have all been in force, such order, in view of those sections, necessarily implies that the consent to trial was in writing, unless the contrary appears by exception

duly saved.) "And since the statute, as before *a judgment* upon an agreed statement of facts, or case-stated, signed by the parties or their counsel, and entered of record, *leaving no question of fact to be tried, and presenting nothing but a question of law,* may be reviewed on error. Supervisors v. Kennicott, 103 U. S. 504; U. S. v. Eliason, 16 Pet. 291; Burr v. Des Moines Co., 1 Wall. 99; Campbell v. Boyreau.

"The record before us contains nothing to show that there was any stipulation in writing waiving a jury. The circuit court had authority to try and determine the case whether the waiver was written or oral."

* * * * *

"The necessary conclusion is, that this court has no authority to consider the exceptions to the admission of evidence at the trial."

* * * * *

"The plaintiffs in error further contend, that neither of the special counts sets forth any cause of action, and that the finding and judgment, being general, and not limited to the common counts, should therefore be set aside. *This objection, so far as it touches the sufficiency of the declaration to support the judgment, is fairly presented for the determination of this court,* within the rule laid down by Chief Justice Taney in Campbell v. Boyreau and by Mr. Justice Nelson in Flanders v. Tweed as already stated. But *by the law applicable to this case,* the objection cannot be sustained. By the common law, indeed, a general verdict and judgment upon several counts in a civil action must be reversed on writ of error if only one of the counts was bad. * * In Illinois it has been changed by statute providing that *'whenever an entire verdict shall be given on several counts, the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts in the declaration shall be sufficient to sustain the verdict':* Rev. Stat. Ch. 110, § 58. That statute governs procedings tried in the federal courts within that state. Rev. Stat. § 914; Townsend v. Jennison, 7 How. 706, 722; Sawin v. Kenny, 93 U. S. 289. And the rule hereby established must be applied to judgments lawfully rendered without a verdict."

Note: The Illinois practice act from which the clause is quoted had, at that point reached the subject of verdicts. Sec. 49 gives peremptory challenges. Sec. 50 requires a non-suit to be taken before the jury retires. Sec. 51 provides that if one or more of the counts is faulty the court may instruct the jury to disregard such counts. Sec. 52, 53, 54,

are in relation to the charge to the jury. Secs. 55 and 56 direct as to what papers may be taken by the jury when they retire to consider of their verdict. Sec. 57 is upon the verdict, motion for new trial and in arrest. Sec. 58 is quoted above in full, verbatim, in the opinion; and is there printed in italics. Sec. 59 provides for a repleader, beginning with the fault, when judgment shall be arrested. Sec. 60 relates to exceptions during the trial. These sections were included in the Revision of 1845 and apply peculiarly to verdicts, and to nothing else. The rule of this court does not require us to quote them all in haec verba, to point the argument we present from the section quoted in the opinion, illustrated by the sections which precede and follow it, which is this: the finding to which this section was applied was rendered in a case where the intervention of a jury was waived and the cause submitted to the court *without writing* as had been the custom in Illinois for forty years (Ill. Rev. Stat. of 1845, Ch. 83, § 22), and this court applied the local statute, that applies only to verdicts of juries, to the finding of the court and judgment based thereon. Treating the finding by the court as having in all things the status of the verdict of a jury, this court in effect determined: that in such a case, there is a judicial trial, in which the finding of the judge is the equivalent of the verdict of a jury. It related to the principle announced by Judge Miller in Norris v. Jackson that in such cases *the court finds a general verdict*, on all issues, for the plaintiff or defendant or it finds a special *verdict*.

*Martinton* v. *Fairbanks*, 112 U. S. 670. Mr. Justice WOODS delivered the opinion of the court, and deciding that upon the record no question of law was presented to this court, having premised that the parties filed a stipulation in writing by which they waived a trial by jury, said: "The provisions of the acts of Congress which relate to the trial of issues of fact by the court, are found in the act of September 24, 1789. 'An Act to establish the judicial "courts of the United States,' 1 Stat. 73, Ch. 20, § 22, and in the act of March 3, 1865, 'An Act regulating proceedings in criminal cases, and for other purposes,' 13 Stat. 50, Ch. 86, § 4. The provision of the act of 1789 is reproduced in §1011 of the Revised Statutes, as follows: 'There shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error * * * for any error of fact.' The provisions of the act of 1865 are reproduced in §§ 649, 700 of the Revised Statutes, as follows: Sec. 649 'Issues of

fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury. Sec. 700. When an issue of fact in any civil cause in a circuit court is tried and determined by the court, without the intervention of a jury, according to section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and, when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment.

"The provision of § 1011 Revised Statutes continues in force and forbids a reversal of the judgment of the Circuit Court for any error of fact. Upon the issues of fact raised by the pleadings in this case *there was a general finding for the plaintiff*. The defendant contends that the evidence submitted to the court did not justify this general finding. But, if the finding depends upon the weighing of conflicting evidence, it was a decision on the facts, the revision of which is forbidden to this court by § 1011. If the question was whether all the evidence was sufficient in law to warrant a finding for the plaintiff, he should have presented that question, by a request for a definite ruling upon that point.

"§§ 649 and 700 were first fully construed by this court in Norris v. Jackson, 9 Wall. 125. The court in that case, speaking by Mr. Justice Miller, laid down the following propositions: (1) *If the verdict be a general verdict*, only such rulings of the court, in the progress of the trial, can be reviewed as are presented by bill of exceptions, or as may arise on the pleadings; (2) in such cases a bill of exceptions cannot be used to bring up the whole testimony for review any more than a trial by jury; (3) that if the parties desire a review of the law involved in the case, they must either *get the court to find a special verdict*, which raises the legal propositions, or they must present to the court their propositions of law and require the court to rule on them; (4) that objection to the admission or exclusion of evidence, or to such ruling on the propositions of law as the party may ask, must appear by bill of exceptions. These propositions have been persistently adhered to by this court."

The court proceeds for three pages to demonstrate that where the finding was general this court could not review it by the evidence, to determine whether it was sustained by the evidence, because a verdict of a jury could not be so re-examined. One expression in quotation marks is not justified by the cases cited, viz: "No exception can be taken when there is no jury, and where the question of law is decided in delivering the final judgment of the court. U. S. v. King, 7 How. 832, 853. See also Craig v. The State of Missouri, 4 Peters 410, 427." The expression which is inaccurate is: "where the question of law is decided in delivering the final judgment of the court." In U. S. v. King, the case came from Louisiana. The court said p. 844: "The circuit court decided that the paper was authentic, and executed at the time it bore date." * * At a former hearing the Supreme Court reversed this finding, page 845. "Upon reconsideration, however, we were unanimously of opinion that the decision of the circuit court upon this question of fact, must, like the finding of a jury, be regarded as conclusive." The whole case shows that though the language quoted was used, it was only intended to apply to a general verdict by the court, and to a special finding of particular facts. It shows that the case was the same as that described by Mr. Justice GRIER: "When the case is submitted to the judge *to find the facts*, without the intervention of a jury, he acts as a referee, by consent of the parties." *Weems* v. *George*, 13 How. 190, p. 197.

*Craig* v. *The State of Missouri*, 4 Peters, 410, is also referred to as sustaining the criticised text, but referring to the opinion by Chief Justice MARSHALL we find (p. 427). "There was no jury to find the facts and refer the law to the court; but *if the court, which was substituted for the jury, has found the facts, on which its judgment was rendered, its finding must be equivalent to the finding of a jury.*"

In *Allen* v. *St. Louis Bank*, 120 U. S. p. 30, the court says: "When a jury is waived in writing, and the case tried by the court, the court's finding of facts, whether general or special, has the same effect as the verdict of a jury."

What was *a general verdict, a special verdict* and *a case stated*, at common law, is very lucidly shown in 3d Blackstone's Commentaries 377, 378; the definitions and particulars of each, being the same as laid down by this court in

interpreting the words *general* and *special* as used in the statute in reference to findings by the court, as well as in those cases, where the trial has been by the court or by a referee under stipulations before the statute or under stipulations not in writing, since the statute that the case should be tried by the court or referee, in the place of a jury; the implication in all cases being that the finding on the issues should have the same effect, in the record, as the verdict of a jury.

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The province of the judge in the trial of an issue made by the pleadings, is, to try that issue by the evidence and render a verdict. (Prentice v. Zane, 8 How. p. 486.)

This court announced, in 1855, that "parties may, by "consent, waive the trial of issues of fact by a jury, and "submit the trial of both facts and law to the court." It will not be a "mis-trial." But if error appears, on the face of the record, the judgment entered will be reversed. (Guild v. Frontin, 18 How. 135.) Therefore, there is a common law record to be inspected.

If the trial, in the case before us, had been by a jury, it is not possible, that a man could be found, who would attempt to confound the record of the verdict, with the judgment.

*The issue* was: whether plaintiffs were owners in fee simple, and entitled to the possession, of that part of lot 2 lying west of the Lake Shore Railroad, and north of a line parallel with, and 753 feet south of the north line of said lot. Defendant denied it.

*The verdict* or finding as rendered is: "And the court, having heard the evidence, and being fully advised, *finds for the plaintiffs.*"

If that is not a good finding, for the plaintiffs, a verdict in the same words would be bad, and would not decide the issue. It is in the words of the Indiana Statute (§§ 545, 551). It is in the exact words of verdicts held good by this court, in many cases.

The next word following this verdict in the record is *and*. It signifies that the court did something else after having made a finding for the plaintiffs, upon the issue of fact submitted to him, which was entered of record, where

it should have *the same effect* as the verdict of a jury so recorded (U. S. R. S. § 649). "The court having heard the evidence, and being fully advised, finds for the plaintiffs, *and orders* and *adjudges*, that they shall have and recover of the defendant. Who ever heard of those two words, *orders and adjudges*, in a verdict?

In the old form, the equivalent would have been: the court having heard the evidence *finds* the defendant *guilty* of the trespass and ejectment, which the plaintiffs in their aforesaid declaration thereof have complained against him; *and Orders and adjudges*, etc.

In the Indiana form, it is equivalent to the more formal record: "And the court having heard the evidence, and "being fully advised, doth find the issues for the plaintiffs, "that they, said plaintiffs are the owners in fee simple and "entitled to the possession of all the lands in their com-"plaint described, that the defendant, Frederick Eggers, at "the District aforesaid, holds possession of the said de-"scribed real estate, without right, and for more than a "year past, has unlawfully kept the plaintiffs out of pos-"session of the same." *And* (thereupon the court) *Orders* and *Adjudges* that the plaintiffs do have and recover, etc.

Upon this record, it is immaterial whether the possession by the defendant, of the land described in the declaration was proved by evidence, was admitted by the defendant in open court or was considered as admitted by reason of the statute of Indiana (§ 1056).

The answer was under Sec. 1055 and contained "a denial of each material statement or allegation of the complaint." The verdict or finding upon each averment of the complaint was under section 551 "for the plaintiff" and against the defendant. *It necessarily found that each averment of the declaration was true.*

Parks v. Turner, 12 Howard, 39, p. 44.
Roach v. Hulings, 16 Peters, p. 321.

## THE JUDGMENT.

"*After verdict*, the successful party is, *of course*, entitled to "the judgment of the court."

RUNNINGTON *on Ejectment*, 393.

"The court must enter a judgment on the verdict, or set it aside, and grant a new trial." (*Mitchel v. Geisendorff*, 44 Ind. p. 360.) The judgment of the court must "accord

with, and rest upon the verdict." (*Bowles v. Stout*, 60 Ind. 271.)

Judgment should conform to the verdict.

Marmaduke v. Tennant, 4 B. Mon. (Ky.) 210, p. 214.

In ejectment, upon a verdict for the whole, a judgment can not be entered for a part.

Obert v. Hammel, 18 N. J. L. (3 Har.) 73.

A general verdict for the plaintiff, entitles the plaintiff to judgment for the entire premises.

McKee v. Wilson, 87 N. C. 300.
Burcke v. Ingham Cir. J. 42 Mich. 513.
Chapman v. Holding, 60 Ala. 534.
Farrow v. Farrow, 2 J. J. Marshall, 388.
Buckley v. Cunningham, 4 Bibb, 285.
Hamner v. Eddins, 3 Stewart, 192, p. 197.
Kirshner v. Kirshner, 36 Md. 335–6.
Betz v. Mullin, 62 Ala. 365.
Cannon v. Davis, 33 Ark. 56.

"The judgment is the sentence of the law, upon the matter, contained in the record."

3 Blackstone, Com. 395.

*Runnington on Ejectment*, 402: "Where there is a verdict, "the judgment may be considered, either, where it is for "the whole or for part only, of the premises demanded by "the action."

Page 404: "If the plaintiff obtain a verdict for the whole, *the entry of the judgment is*, that the plaintiff recover his term in the whole, * * (405) if the plaintiff has a verdict only for part, *the judgment is* that he recover that part, and that as to the other part, whereof the jury acquitted the defendant, the judgment is that the defendant go thereof without day."

*Tyler on Ejectment*, p. 584. "If the verdict, in the action "of Ejectment, is in favor of the plaintiff, for the premises "in the declaration described, in general terms; *the entry of* "*Judgment is*, that the plaintiff recover his term against the "defe..dant, of and in the premises aforesaid. (Doe v. Wil- "son, 2 Starkie, R. 477; Simpson's Heirs v. Shannon's Heirs, "5 Litt. 322; Farrow v. Farrow, 2 J. J. Marsh. 388.) But "when the verdict is in favor of the plaintiff, for a part "only of the premises claimed in the declaration, and in "favor of the defendant, for the residue, *the judgment is:* "that the plaintiff recover possession of the part found for "him by the verdict; and as to the other part, that the "defendants go thereof without day."

(See also *Gilbert* on Ej. p. 303.)

These are the forms given in all the books. They are definite, concise, explicit. Any one can see with certainty who the judgment is for, and who the judgment is against.

It is in support of the most sacred rights of property and the highest functions of the law that we insist that those forms and methods shall be observed, which assure definiteness, conciseness, clearness, certainty, that assure to every citizen the power to understand the judgment.

Understanding the necessary substance of verdicts in actions of ejectment, and the necessary form of judgment thereon, the legislature of Indiana enacted: "the court "rendering the judgment, on application made within one "year thereafter, by the party *against whom judgment is ren-*"*dered,* * * * shall vacate the judgment and "grant a new trial." (§ 1054.) This is the right of the suitor in National courts as well as in the State courts. (*Equator Co.* v. *Hall*, 106 U. S. 86.) Adherence to the forms and methods of proceeding which the legislature had in mind is essential to preserve, substantially and certainly, the right it intended to confer.

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So we have examined the steps.

The *issue*, the matter to be tried, is determined by the parties.

The *verdict* or *finding* is confined to the very point in issue. The tribunal has no jurisdiction to adjudge any matter outside of that.

The parties, who make up the issue, have the right to have it tried and determined, by a jury of twelve men. If both parties agree, they may waive a jury, and substitute the judge in place of the jury, to try the issue, and render a verdict just as the jury might do. The law determines what the submission is. The law prescribes the duties of the judge, and the duties of the clerk of the court. *The contract of submission is, that the judge shall, render a verdict precisely as a jury would do.* The law commands that the finding of the judge, announced by him, shall be recorded by the clerk, and shall have the same effect that the verdict of a jury in like manner announced, by it and recorded by the clerk of the court, would have. The law requires the court to order judgment, or to set aside the verdict, and grant a new trial. This may be done at once, as soon as the verdict is delivered. But if the court orders that judgment be entered, *the law prescribes the substance of the judg-*

*ment*, and *the Clerk* is by law required to write out that substance.

*The Court* or the law commands: "Let judgment be entered." *The Clerk* makes a minute of it, and after the court has gone he writes it out upon the record. He can not be directed by the judge, but by *the issue* and the *verdict* thereon, which have preceded, upon the same record. If the clerk enters the judgment accordingly, it is well. If he fails to pursue the issue and the verdict, the law commands that it be amended. (U. S. R. S. § 954.)

Where the parties have submitted the issue to the court for trial, it will not be a mis-trial, but if error appears on the face of the record, the judgment entered will be reversed. (*Guild v. Frontin*, 18 How. p. 135.)

This court said in *Suydam v. Williamson*, 20 How. p. 433: "The operation of the Writ of Error, addresses itself to the "record, as an entirety, and not to any separate portion of "it, as distinct from the residue; and when the cause is re- "moved into the appellate court, any error apparent in any "part of the record, is within the revisory power of such "tribunal. The rule is: that whenever the error is apparent "on the record, it is open to revision, whether it be made "to appear by bill of exceptions, or in any other manner. "Bennett v. Butterworth, 11 How. 669; Slacum v. Pumery, "6 Cranch, 221; Garland v. Davis, 4 How. 131; Cohens v. "Virginia, 6 Wheat. 410."

In *Zeller v. Eckert*, 4 How. 297–8, the function of bills of exceptions had been distinctly defined, thus: "So far as "error is founded upon the bill of exceptions, incorporated "into the record, it lies only to exceptions taken *at the trial*, "to the ruling of the law, by the judge, and to the "admission or rejection of evidence. (1 Bac. Abs. 779; "Bull. N. P. 316.) *Beyond this, we have no power to "look into the bill, on a writ of error, as it is the creature "of statute, and restricted to the points stated.* (13 Edw. 1 "Ch. 31.)"

Hence, as the faults, in the record before us, occurred after the trial, and after the finding for the plaintiffs had been announced and recorded, they are apparent on the face of the record, and no part could be played by bill of exceptions. This record is perfect and impregnable till the end and result of the trial was reached. No exception was taken. The finding is exactly responsive to the issue. No exception could be taken to any subsequent step by bill of exceptions, because as stated above: "it is the creature of statute and restricted to the points stated."

It is apparent on the face of the record that the judgment entered up after that, is not confined to the point in issue, and embraces matter about which no evidence could be received. If this was the act of the court, it was error; if it was the fault of the clerk, it is to be amended.

If dictating the contents of the entry of judgment, is the duty and function of the judge at common law; if what is written down as *the judgment* is to be written in words dictated by the judge, the judge erred in requiring these words to be written; but if it is the duty of the clerk to write out the judgment of the law, if it is his function and duty to furnish the words, then the words are in all cases considered his, whether the judge helps him write his record or not; and the faults noted are *misprisions* to be amended.

We quote below, a great array of authority, showing the function clerical; and that if that which is written down, is not the judgment of the law on the issue, and confined to the issue, it is a misprision to be amended. We wish to add one leading case, as showing how far the doctrine is carried. In *Usher v. Dansey*, 4 Maule & Selwyn, 94, pp. 97–100, a verdict had been rendered for a sum in excess of that demanded in the declaration, and judgment entered for that sum. But by the King's Bench, it was held *vitium clerici;* and the judgment was amended by the declaration; because it was the duty of the clerk to pursue the issue in entering the judgment, which is the legal sequence of the issue.

*Burdle* v. *Ingham Circuit Judge*, 42 Mich. 513, is a case where the clerk entered up the judgment for the plaintiff without any motion being made for that purpose.

In general practice where a verdict is rendered for the plaintiff or defendant, there is not one case in a hundred that the judge orders a judgment to be entered. Where entry of judgment is stayed by motion for new trial, the judge announces that the motion will be denied, but it is very rare that he says anything more, and the clerk enters up the judgment. Thus in 999 cases in every thousand the entering up of judgment is strictly clerical, in every day practice. There is not one case in a thousand where the judge looks at the entry.

The following authorities are referred to on the subject of

AMENDMENT.

GILBERT *on Ejectment* (p. 92). "As the verdict is the "ground of the judgment, it ought not to be entered for

" more land, or different parcels, than the defendant was " found guilty of by the verdict. But a variance between " the verdict and judgment, occasioned by the misprision " or default of the clerk in entering the judgment, *is not fa-* " *tal*, but hath been amended by the court, after Writ of " Error brought * because it appeared to be the mispris- " ion of the clerk, *who had not pursued the verdict, which* " *ought to have been his guide in making up the judgment*, and " no mistake in point of law, in giving the judgment; " therefore the party ought not to suffer for his mispris- " ion."

Page 114. " Where judgment is given on verdict, there " the verdict is the foot and ground of the judgment."

RUNNINGTON *on Ejectment*, page 401. " The verdict being " the ground of the judgment, the judgment ought not to " be entered for more land, *or for different parcels*, than the " defendant was found guilty of by the verdict, yet a vari- " ance between the verdict and judgment, occasioned by the " misprision or default of the clerk in entering the judg- " ment, *is not fatal*, but may be amended by the court, even " after a writ of error brought" * " because the variance " arose from misprision of the clerk, who had not pursued " the verdict, which ought to have been his guide, in mak- " ing up the judgment."

ADAMS *on Ejectment* (page 328), states the same doctrine.

TYLER *on Ejectment*, concurs, p. 582.

In the cases below cited from Viner's Abridgment and Bacon's Abridgment, the *judgments* were in actions of *Ejectment* for damages and costs only, and no judgments for possession of the land, yet the court *reformed* them, by amendment *nunc pro tunc*, completing them as judgments for possession, and they were affirmed.

VINER'S *Abridgment* (2 Vol. 310) title *Amendment* (F) 8. "In an ejectio firmæ of land, if, upon not guilty pleaded, a "verdict is found *for the plaintiff*, and costs and damages "given per curiam, and thereupon judgment is given: "Quod querens recuperet the damages and costs, and *not* "quod recuperet *terminum* as the use is; this is the fault of "the clerk, this being the usual judgment in this action, and "therefore it shall be amended. This was done upon a "motion after a writ of error brought in Belch v. Pate, 15 Car."

So in the same place (2 *Viner Abr.* 310) several cases are cited where the judgment was entered for a larger number of acres than had been recovered by the verdict, and it was amended by the verdict.

BAC. ABR. title *Amendment and Jeofails* (F). "In Eject-"ment, if the judgment is entered quod quærens recuperet "the damages and costs, and not quod recuperet terminum "as the case is, *this shall be amended.*"

These authorities are constantly applied in such cases as this at bar: Witness the following cases—

*Fite v. Doe*, 1 Blackford, (Ind.) 127. Ejectment. *Blackford, J.;* p. 132. "The second error assigned is, that judg-"ment is only rendered for damages and costs, instead of "being in the usual form, *quod querens recuperet terminum*" (that therefore he recover his term, &c.) "Such an omis-"sion is nothing more than a misprision of the clerk, and "might be amended, 2 Vin., 310; 1 Bac., Abr. 165." It was considered as amended.

*Smith v. Myers*, 5 Blackford, 223. Action on a penal bond, default, and proof of $250 damages and judgment for plaintiff. By neglect or mistake of the clerk final judgment was only rendered for costs.

"*Blackford*, J.: (p. 224.) The omission to enter the for-"mal judgment for the penalty is only a misprision of the "clerk. Such a misprision may be amended on notice and "motion, at any time. It has been held that where the "judgment in ejectment is entered, *that the plaintiff recover* "*his damages and costs*, instead of *that he recover his term*, the "judgment may be amended, though this is but an action "of trespass in its own nature. 1 Bac. Abr. 165. There "seems to be as little reason to object to the amendment in "the case before us, as to that in the case referred to."

*McManus v. Richardson*, 8 Blackford, 100. *Blackford*, J.: "In ejectment, if the judgment be entered 'that the plaintiff "recover the damages and costs,' omitting that he recover "his term, it may be amended even after error brought. "2 Viner Abr. 310; Fite v. Doe, 1 Blackford, 127. So "where judgment is entered against an administrator de "bonis propriis, when it should be against the goods of the "intestate, it may be amended after error brought: Short "v. Coffin, 5 Burr. 2730; King v. Anthony, 2 Blackf. 131," therefore a justice's judgment was reformed by amendment.

Indiana reports are full of such amendments, *nunc pro tunc.*

Jenkins v. Long, 23 Ind. 460.
Bales v. Brown, 57 Ind. 282.
Latta v. Griffith, 57 Ind. 329.
Burson v. Blair, 12 Ind. 371.
Silver v. Butterfield, 2 Ind. 24.

Fite v. Doe, 1 Blackford, 127.
Smith v. Myers, 5 Blackford, 223.
McManus v. Richardson, 8 Id. 100.

In *Usher v. Dansey*, 4 Maule & Selwyn, 94, (above cited) entry of judgment for the full amount of a verdict, which was in excess of the sum demanded in the declaration, was held the fault of the clerk and amended. In so much as the verdict exceeded the issue it was surplusage.

In *Rees v. Morgan*, (3 Durnford & East, 349,) where the defendant in *replevin* made cognizance of rent in arrear, and the jury found a verdict for him, and damages to the amount of the rent claimed in his cognizance, namely 195*l*; the verdict endorsed on the panel was: "verdict for the defendant, damages, 195*l*;" and judgment was thereon entered against the plaintiffs for that amount, and for costs.

After writ of error brought by the plaintiff, and in the Court of Error, to which the whole record had been sent, the defendant moved that the judgment "be amended by altering it to a judgment *pro retorno habendo*." (See Maryatt's motion, p. 349.) And the judgment was so altered. (See Syllabus by the reporter.) Chambre, etc., opposed the motion; showing that the judgment could not be supported as it was; and arguing (p. 350): "Neither can it be *altered* to a judgment pro retorno "habendo at common law." * "He can not *now* "*enter up a common law judgment* under pretense of amend- "ing a mistake of the clerk. Under the statutes of jeofails, "all errors in the process, and even the mistakes of the clerk "in entering up judgments, may be amended; but this can "not be considered a mistake of the clerk, for it is an at- "tempt to enter up an entirely new judgment." *

* "The utmost therefore that can be done is to "alter a judgment when the clerk (strictly speaking) has "make a mistake, but not to alter an erroneous judgment, "when there is no misprision of the clerk. The Statute 8 "Hen. 6, C. 12, S. 2, which enables the court to amend in "affirmance of the judgment given, does not empower them "to enter up a different judgment.

"*Lord Kenyon*, C. J. *The amendment prayed for is an in-* "*evitable consequence of the finding of the jury.* On the prem- "ises, which the jury have found, no other judgment than "that at common law could be entered. I think the "case in Burrow goes the full length of deciding the pres- "ent."

So by the whole court the judgment was amended nunc pro tunc and affirmed.

The case in Burrow, referred to, is *Short v. Coffin*, 5 Burr. 2730: "The court, after taking two or three days to consider of it, were all clearly of opinion to amend a judgment against an executor, de bonis propriis, *by making it* de bonis testatoris si, &c.; et de bonis propriis si non, &c.

"Mr. Davenport had moved for this amendment, upon the foot of its being only a mistake of the clerk," and cited numerous cases.

"Mr. Wallace, who opposed the amendment, denied it to be a mistake of the clerk. He said it was a mistake in law, and this amendment would alter the essential judgment." (Citing authorities in point.)

"*But* LORD MANSFIELD *delivered it as the opinion of the court: that this is not an error in the judgment of the court in point of law; but a mere mistake of the clerk.*"

These cases are specially quoted because the statute of the United States (§ 649), provides that the finding of the judge shall have the same effect as the verdict of a jury. The verdict of a jury in *Rees v. Morgan*, was extremely informal—"*for the defendant;*" yet the whole King's Bench determined that "*the amendment prayed for is the inevitable consequence of the verdict of the jury.*" The cases arose under the statute of which our section 954, *United States*, R. S., is a complete re-enactment, viz: Statute 8 Hen. VI, c. 12 § 1. "For error assigned or to be assigned in any record. * * * No judgment nor record shall be reversed nor annulled.

"§ 2. And the judges of the courts and places in which any record * for the time shall be, shall have power to examine such records * and to *reform* and amend (in affirmance of the judgments of such records and processes) all that which to them in their discretion seemeth to be misprision of the clerks in such record."

The words in parenthesis are contained in parenthesis in the original. It is apparent that their omission has no effect in the version of the same general law found in our Statute, Sec. 954. "No * judgment * shall be *reversed for any defect.* * But the court shall amend *every such defect.*" This necessarily is in affirmance of the judgment.

*This court has so reformed the entry of a judgment, nunc pro tunc.*

At the January term, 1829, of this court (Feb. 14, 1829,) in the case of *The Bank of Kentucky v. Wister*, (2 Peters, 318,)

the opinion concluded with the words: "the judgment is "affirmed with costs;" and the judgment order is so found upon page 326 of that report.

At the January term, 1830, motion was made "to amend "the judgment rendered in this cause, at the January term, "1829, by giving to the defendants in error damages on the "judgment, at the rate of six per cent. per annum, and that "the judgment of the court be so reformed."

*Marshall*, C. J. "The court directs the amendment to be "made, and the judgment of the court to be reformed, "allowing interest at the rate of six per cent. The reason "is, that by a rule of this court, when there are no special "circumstances, six per cent. is allowed upon the amount "of the judgment in the court below; under special circum-"stances damages to the amount of ten per cent. are awarded "by the court. The omission is deemed by this court a "mere clerical error." The judgment of Feb. 14, 1829, was reformed by the amendment so that the judgment read thus: "It is adjudged and ordered by this court, that the "judgment of the said Circuit Court in this case be and the "same is hereby affirmed with costs *and damages at the rate "of six per cent. per annum.*"

*Bank of Kentucky v. Wister*, 3 Peters, 431.

Such has been the uniform law from the collation of the authorities in *Mason v. Fox*, Cro. Jac. 632. (Which was an action of ejectment, in which the judgment was amended and reformed to conform to the verdict.)

The judgment we are examining is a final judgment on which a writ of error will lie; and it only wants to be amended. (*Runnington on Eject.* 401; *Gilbert* on Eject. 92; *Woodward v. Brown*, 13 Peters, 1; *Stockton v. Bishop*, 4 How. 155, p. 168; *Miller v. Royce*, 60 Ind. 189; *The State v. Cross*, 6 Ind. 387.)

In *Miller v. Royce, Administrator* (60 Ind. 189), it was held that a judgment entered Sept. 10, 1864, should in 1877 (thirteen years after the entry) be *reformed*, amended and corrected as prayed for in the motion (p. 191): "by inserting therein *as of the date thereof*, the amount": $1,333.35. The subject of the Statute of Amendments and Jeofails was carefully discussed, and the conclusion, that the judgment should be so amended and reformed *as of the date thereof*, was stated at the conclusion of the opinion.

In *The State v. Cross* (6 Ind. 387), it was objected that there was *no judgment for the debt;* but held that as there was a judgment, and the record showed what the judgment ought

to be, the judgment must be reformed by the Supreme Court, or considered as amended.

In *Sherman v. Nixon*, 37 Ind. 154, a judgment for $105.83, was *reformed* and made into a judgment of $505.83, *nunc pro tunc* as of the date of the judgment.

## THE RECORD BELOW.

The Judge of the District Court says, in effect, of the record below, that he is clear, that justice was not administered in the case, in the ordinary form. This court says: "we are bound to presume that justice was administered in the ordinary form." (*Stockton v. Bishop*, 4 How. 167). This was the ground of decision upon one of the most imperfect of records. We wish to quote from the case, as it shows how clearly the issue and the finding designate what the judgment must be.

*Stockton v. Bishop*, 4 How. 155, p. 167. *Catron, J.*

"Who the jurors were, or how many found the verdict, "does not appear; nor does it appear that they were sworn "to try the issue, further than the jury say in their verdict. "Still *we are bound to presume* in favor of proceedings in a "court having jurisdiction of the parties and subject-"matter, *that justice was administered in the ordinary "form*, when so much appears as is found in this imperfect "record. *The declaration, plea and finding* must be taken "together; and *from these*, we are bound by the 32d section "above cited" (R. S. § 954, Jeofails) "to ascertain whether, "according to the right of the cause and matter in law, the "plaintiff is entitled to her damages."

Page 168. "According to the right of the cause and "matter of law appearing to us *on the pleadings and verdict*, "we think the plaintiff is entitled to her damages, and the "judgment below ought to have been rendered for her.

"But the judgment there given is also assailed, and "justly, as being less formal than what precedes it. *It is "either no judgment or binding.* If it amounts to nothing, "then, by the 22d section of the judiciary act, no writ of "error lay, and the case must be dismissed for want of "jurisdiction, and the plaintiffs in error be sent to the court "below to quash the execution. We think, however, there "was a judgment on the verdict, that warranted an execu-"tion for the damages found, and consequently the prose-"cution of a writ of error. And this being so for the rea-"sons above stated, such judgment must be affirmed."

How is justice administered in the ordinary form, that is to be presumed, according to this decision?

The functions of a jury are distinctly defined. So also are the functions of the judge, when an issue of fact is submitted to him, under the statute. (And the judgment is conclusive evidence that this case was submitted in full compliance with the law, 4 How. 167; *Grignon's Lessee v. Astor*, 2 Howard, 319.)

When the jury, or the court, renders a verdict, it is entered upon the record by the clerk. The court either sets aside the verdict, or orders judgment to be entered. If the judge leaves the bench, and goes to help the clerk write up the judgment it is still the act of the clerk.

*If it is the act of the clerk in one case, it is his in all cases.* The effect of the record of judgment can not be *varied*, by parol evidence of a fact entirely extrinsic, and known only to the writers. The effect can not be rendered doubtful by defective memory, or conflicting evidence as to how much of the language was the dictation of the judge, and how much was supplied by the clerk. It would take the judge from the bench and the clerk from his desk, and put them on the witness stand, in every such case, and there would be no court to pass upon their credibility, unless the trial be by jury as above shown to be requisite.

The record made by the clerk of the court below certainly was: "And the court having heard the evidence, and being fully advised, *finds for the plaintiffs*." There was a declaration and plea; and this finding thereon seems to be the ordinary form of a finding in Indiana, upon the whole issue, so made. Under the next decision of this Court, which we will quote, *this was a distinct affirmation that each and every averment of the declaration, put in issue by the plea was found to be true*, as completely as though the averments were restated in the finding:—

*Roach v. Hulings*, 16 Peters, 319, p. 321, *Daniel, J.*

"The point raised and pressed by counsel is: that the "jury, in rendering their verdict, failed to respond sepa- "rately to the distinct issues they were sworn to try; and " that this failure by the jury, constitutes an error for which "the judgment of the Circuit Court should be arrested * " * The three issues were joined, upon affirmative "allegations, by the defendant: 1st, that the intestate had "performed his covenant; 2d, that he had paid whatever " was due the plaintiff; and 3d, that the defendant possessed, "in right of his intestate, a claim against the plaintiff

"greater in amount than the plaintiff's demand against him. "Upon these affirmative averments, the jury find a verdict "*for the plaintiff*. Admitting that this verdict is not techni- "cally responsive to the several pleas, it virtually answers "and negatives them all; for if all or either of the pleas had "been true, the verdict was untrue."

A general finding, *for the plaintiff*, is equivalent to an express negative of each plea. *Strohecker v. Drinkle*, 16 S. and R. 38.

So it is established, that it is to be presumed that justice was administered in the ordinary form, even in the Circuit Court of the United States, for the District of Indiana:— that the judge performed *his* function, and *the clerk* performed *his*, that *the Judge announced his finding, and the clerk recorded it;* that judgment was ordered in the same manner as has been the custom for several hundred years (*Mason v. Fox*, Cro. Jac. 632); and when the clerk wrote out the judgment, he made such mistakes and misprisions, as made the statute of Jeofails necessary, as early as 14 Edw. 3, (A. D. 1341); such as were customary in 1622, at the time the instance in *Mason v. Fox*, (Cro. Jac. 632) came up, and was corrected, and have been customary ever since.

The record under consideration, is not as meager as that reviewed in Stockton v. Bishop, *supra*.

It is sometimes said: that a written instrument must have the same effect however punctuated. It certainly ought to be the rule, that a record ought not to be impeached because not punctuated, or because the capitals are omitted from the copy sent up. But let us run the entry below together, and read it thus:

"come the parties by counsel and by agreement this cause is submitted to the court for trial and the court having heard the evidence and being fully advised finds for the plaintiffs and orders and adjudges that they are entitled to and shall have and recover of defendant the possession of so much of said lot two (2) as lies south of the south line of lot number one (1) as indicated by a fence constructed and maintained by the defendant as and on said south line said fence running from the state line easterly to lake michigan and assesses the damages at $1 and costs taxed at $— which the said plaintiffs shall recover of said defendant all of which is finally ordered adjudged and decreed."

That is as bad as it could be written. Yet when we re-

member what has gone before on the Roll: the *declaration* and *plea* making the *issue;* and remember the proper duty and function of the judge, and the proper duty and function of the clerk, the sense is the same as if the record was carefully enrolled as shown below—(and *non constat* but it is so enrolled at Indianapolis. I certainly have never seen the record itself.)—

COME THE PARTIES by counsel.

AND, BY AGREEMENT, this cause is *submitted to the court, for trial.*

AND THE COURT, having heard the evidence, and being fully advised, FINDS FOR THE PLAINTIFFS.

AND ORDERS AND ADJUDGES, THAT THEY, are entitled to, and SHALL HAVE AND RECOVER OF THE DEFENDANT the possession of so much of said lot two (2) as lies south of the south line of lot number one (1) as indicated by a fence constructed and maintained by the defendant as and on said south line. Said fence running from the State line easterly to Lake Michigan, and assesses the damages at $1, and costs taxed at $— which the said plaintiffs shall recover of said defendant. All of which is finally ordered, adjudged and decreed.

Had the clerk, in the beginning of the last paragraph, inserted the understood words, so that the paragraph had begun: "and *the court* orders and adjudges that the plaintiffs shall have and recover of the defendant" it would have added nothing, yet it would have made it impossible to suggest that the judgment is not separate from the verdict. If the clerk had written: "and *it is* ordered and adjudged that the plaintiff shall have and recover," it would have been impossible to suggest that this is not a judgment following on the verdict, in ordinary course of the common law. So slight a change of words, by the clerk, is seized upon, as the basis of a claim, that plea was not held in that case "according to the course of the common law." Yet the law was clear, *that the pleas shall be held and shall be entered of record according to the course of the common law.* The court had authority to hold them and record them in that manner, and no other. (1 Co. Inst. 260a.)

These words "*orders and adjudges*" are used interchange-

ably with, "*it is considered by the court*" in the precedents of entrys of judgment in Ejectment. (GILBERT *on Ej.* 298, 307.) Had the clerk used the words "and it is considered by the court, that the plaintiffs have and recover," it would not have changed the sense or effect, in the view of the common law.

Gilbert gives the precedent on p. 298: "Therefore it is considered (*or adjudged,*) that the said Charles do recover," etc.

On page 307, he gives it thus: "It is considered (*or adjudged,*) that the said R. do recover against the said L." etc.

How can the record be impeached by so slight a change of words? The record is: "the court having heard the evidence, and being fully advised, finds for the plaintiffs." The words are pregnant words. The record is solemn. It is the formal entry of that which has taken place in court. *That matter necessarily transpired.* This is the formal entry of that which in myriads of adjudged cases, has been held to be the final decision upon the matter in issue. It is the entry of that form, in which a jury many times has presented its stern defiance to the bench, as Blackstone says:

"But in both these instances, (*Special verdict* asked, or *case stated*) the jury may, if they think proper, take upon themselves to determine at their own hazard, the complicated questions of fact and law, and without either special verdict or special case, may find a verdict absolutely, either *for the plaintiff* or defendant. *When the jury have delivered their verdict, and it is recorded in court,* they are then discharged. *And so ends the trial by jury.*" (3 Blackstone Com. 378.)

And so ended the trial in the case at bar, by the solemn delivery of the finding for the plaintiff, and recording of it in court. The statute says: "it shall have the same effect as the verdict of a jury." The district judge of Indiana, holding the Circuit Court, says it shall not have the same effect as the verdict of a jury, because the clerk omitted, from the next entry he made on the roll, the words, *the court,* which were understood in the place, or the words *it is.*

In judging upon this record according to the rules of the common law we read again from COKE *on Littleton,* 226 a: "For jurors are to try the fact, and the judges ought to judge according to the law that riseth upon the fact, for ex facto jus oritur." Again (227 b): "That verdict which is recorded shall stand." "An issue found by verdict shall always be intended true until it be reversed by

attaint." What is the end of the trial of the fact, and the beginning of the ordering and adjudging is as clear in this record as in any record of which the precedents are cited. It appears that the trial came to an end, that the judge found for the plaintiffs and had it recorded, and afterward the clerk wrote out the judgment and got it wrong. There can be no intendment against that which is right and regular upon the record, because that which is subsequently written is irregular. The statute which says the finding shall have the same effect as the verdict of a jury can not be frittered away, because the clerk omitted the words "the court," or "it is," from the judgment entry.

Thus we have traced the trial of Actions at Common Law as described by the Constitution and Statutes of the United States. In *Graham v. Bayne*, 18 How. p. 62, this court said, that if the parties to a suit, chose to make the judge an arbitrator, they could not constitute this court appellate arbitrators. The statute, allowing submission to the court and substitution of the court for a jury, and finding by the court in lieu of verdict of a jury, has not made the judge an arbitrator, nor has it changed the functions of the judge and clerk in any manner except as specifically named in the section. It is the duty of the judge to announce a finding on the issue, which shall have the effect of the verdict of a jury. And when that is in fact done and entered of record, by the clerk, it is as conclusive on all subsequent matter, and must have the same effect, as a verdict of a jury in the same words.

The common law respects the rights of both parties, and will not permit a man, brought from his home to try one issue, to be bound by evidence presented on another. Certainty, in the issue, and honesty, in the trial is required. Each party must state the facts of his case, if his case is affirmative, and confess and avoid, traverse or deny the facts averred by the other side, if his case is negative. He must do this on the record, and issues so made upon the record are the only ones which can be tried by courts of record. If the evidence presented, misleads the jury, so that having considered among themselves, their "verdict materially differs from the pleadings and issue thereon," judgment must be arrested. If the trial court refuses, a court of error will compel it. "If the case, "laid in a declaration, is not sufficient, in a point of law, to "found an action upon," no matter, how good a cause of action may have been shown by the evidence, nor how well,

the parties may have understood it, "judgment shall be arrested and never entered for the plaintiff."

3 BLACKSTONE, *Com.* 393.

And this is well; for one well meaning or corrupt judge could, under color of administering general equity, do more harm, than a dozen others could do good, under any latitude on the issue; and a record would not determine what had been tried.

BLACKSTONE says (3 Com. 395): "Judgments are the sentence of the law, pronounced, by the court, *upon the matter contained in the record.*"

Page 396. "The judgment, though pronounced or *awarded by the judges*, is not their determination or sentence but the determination and sentence of *the law.*"

Our claim, based upon the record and the common law, is technical. Our technical knowledge is our defense. We are compelled at our peril, to know what the issue is; what is to be tried; and to prepare for it. No matter how many just claims or just defenses we may have—no matter how much talk and bickering we may have had with our adversary, that avails nothing, if not part of the issue. When a party has gone two hundred miles or five hundred miles to the place of trial, with his evidence and witnesses, and has entered upon the trial, if then the judge says to that party: "You have not come all this distance, without knowing that there would be evidence about boundary, and I will not permit you to escape the effect of the evidence,"—we think of Macauley's description of Lord Jeffries, and are thankful that the technical rules of common law can protect a party, in the midst of his trial, two hundred miles from any witness on that point.

Our recollection is, that no such announcement was made during *this* trial, nor when the verdict was pronounced for the plaintiff; our recollection is, that the evidence of the location of the boundary line was, as we supposed, of an immaterial character, which we did not care to preserve by bill of exceptions, when the verdict was for the plaintiff. Our recollection is, that January 20, 1883, *after the verdict was delivered, for the plaintiff, and entered by the clerk*, some discussion arose as to the form in which the clerk ought to enter judgment on that verdict; which was adjourned to a later day; and that the undersigned went to Indianapolis in March, and made an argument on that point; which was taken under advisement and was not decided until June, the day Judge

Gresham left the bench to assume the office of Postmaster General.

We do not find any statute of the United States, prescribing the time when any judgment shall be entered of record. *Blackstone* says (3 Com. 395): "If judgment is not by "some of these means, arrested within the first four days of "the next term, after the trial, it is then to be entered, on "the roll or record." Our recollection is; that judgment was not ordered when the verdict was given; and we believe it was not written out by the clerk upon the record, till in June, 1883. Living at a long distance, we did not see it or know its contents till March, 1884.

What we say, of recollection, can have no effect upon this case; except as it illustrates the law, on which ultimately we must rely, both as our protection and our advocate.

Whether plaintiff in error or their counsel, knew of the intent to write out the record in the way it is, or not; whether they felt they were subjected to outrage at the trial, or subsequent arguments, or not, does not appear by the record.

That plaintiffs in error are *aggrieved*, by the judgment record, is apparent. They were not called to trial upon anything but *their right to the land in the declaration described.* They were called to try no issue upon the boundary of lot one. The verdict or finding, for the plaintiffs, was responsive to the issue they were called to try; the judgment describes a boundary not in issue, and comprises land not in the declaration.

But for the statute of Jeofails, a Writ of Error would set that judgment right. (3 BLACKSTONE, *Com.* 407.) But now, under the statutes of Jeofails (*United States R. S.* Sec. 954), it is commanded that the court in which the record may be, *shall amend every such defect.* Hence plaintiffs in error rely upon the justice of the law; which is a law as well for the Judges of the Circuit Court as for them, and under the judgment of this court (114 U. S. 174) they present their averment that the Judge of the Circuit Court ought not to have denied their motion that the judgment be reformed.

In the petition for mandamus, the order asked was suggested in the following words, which we believe to contain substantially the amendment to which the plaintiffs in error are entitled.

WHEREFORE and inasmuch as the said Circuit Court has refused to cause said judgment entry to be amended so as

to conform to the declaration and issues and the finding thereon, and as the law provides no other adequate remedy in the premises, your petitioners pray that the writ of mandamus may be issued and directed to the judges of the said Circuit Court, commanding and enjoining them to cause said judgment entry to be amended so as to conform to the complaint in said cause and to the finding or verdict of the court rendered upon the trial of said cause.

And especially commanding that said Circuit Court enter an order in the words and figures following or equivalent words, to-wit: *It is ordered* and adjudged by the court that the said judgment in said cause wherein Dayton S. Morgan and E. Ashley Smith were plaintiffs, and Frederick Eggers was defendant, entered on the 20th day of January, A. D. 1883, at the November Term, A. D. 1882, be and the same is hereby amended and reformed so that the same shall conform to the complaint and finding of the court, and from and after the record of the finding of the court for the plaintiffs shall read thus:

"Therefore it is considered and adjudged that they, said plaintiffs, as tenants in common, are the owners in fee simple of, and are entitled to, and shall have and recover of and from the defendant the possession of the said lands and premises in their complaint described, that is to say: All of the north part of Lot Two (2) in Section Thirty-six (36), in Township Thirty-eight (38) North, of Range Ten (10), West of the Second Principal Meridian, which lies west of the track of the Lake Shore and Michigan Southern Rail Road, and North of a line paralled with the North line of said Lot Two (2) and Seven Hundred and Fifty-three (753) feet south therefrom; and also that plaintiffs do recover of said defendants their costs of this suit to be taxed. (Gilbert on Eject. p. 298).

Or that such other order may be had in the premises as justice may require.

EDWARD ROBY,
*Counsel.*

154-63

# Supreme Court of the United States.

**OCTOBER TERM, A. D. 1887.**

*No. 200.*

DAYTON S. MORGAN AND E. ASHLEY SMITH,
PLAINTIFFS IN ERROR,

*vs.*

FREDERICK EGGERS, DEFENDANT IN ERROR.

BRIEF ON AFFIDAVITS OF VALUE.

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## BRIEF ON AFFIDAVITS OF VALUE.

At the time of the trial below it was conceded that the land in controversy was worth $20,000, as I recollect it.

In 1885 the case was here on petition for mandamus, and it was conceded that the value involved was sufficient to give jurisdiction to this Court. (*Ex parte* Morgan, 114 U. S., 174.)

When the writ of error was sued out the judge who signed the citation was satisfied that the value in controversy exceeded $5,000.

The affidavit on which he acted was not sent up like several other papers which have been supplied by stipulation.

On applying to counsel for defendant in error in Decem-

ber for such a stipulation they declined to make it until authorized by their client. On hearing from him, after a long time, the counsel kindly sent me the letter printed with our affidavits (p. 1). I at once sent them the brief on the merits, as asked, and February 14 gave them the notice of filing affidavits and received the admission of service, also printed at the head of the affidavits.

The affidavits presented by plaintiffs in error are as follows:

(1.) DAYTON S. MORGAN (plaintiff) says the value of the land in controversy from July 26, 1882 (the date of beginning the suit below), has at all times been and is over ten thousand dollars ($10,000).

(2.) E. ASHLEY SMITH (plaintiff): Over $10,000.

(3.) EDWARD ROBY (counsel) says that till very recently it was fully conceded that the land was worth over $20,000; that the land is shown on a plat (diagram opposite page 9); that in 1875 the Baltimore and Ohio railroad acquired the adjoining lands, marked on the plat B. & O. R. R., by condemnation; the commissioners assessed the value of the lands at $1,500 an acre. On appeal, tried in circuit court, Eggers called deponent as a witness as to value, and he was sworn and testified for Eggers as a qualified witness as to the value of the land. The court adjudged the value to be $1,500 an acre. In 1877, when the value of land in that vicinity was at its lowest ebb, deponent sold five acres, five hundred feet south of south line of the section, for $1,000 an acre, paid in full in cash. Deponent sold several small parcels in the vicinity of the land in question from 1877 to 1884 at from $1,000 to $4,500 per acre.

In 1884 the Pennsylvania Company purchased two acres, extending to within ten rods of the land in question, at $2,500 an acre. In 1884 deponent caused a block (described) within three-quarters of a mile to be subdivided and sold in lots at the rate of $4,000 an acre; on the lots so sold houses worth $1,100 to $5,000 have been built. Deponent knew of the sales by McLennan in 1884 at $400 to $500 a lot, being $4,000 to $5,000 an acre. Deponent was well acquainted with land in controversy, and says it has been at all times of the controversy worth over $20,000.

(4.) JAMES TULLY gives the value at all times from January 1, 1882, above $10,000.

(5.) FREDERICK W. JONES, likewise above $10,000.

(6.) PATRICK L. MURPHY, for many years a policeman in same district and precinct, who has lived within a mile since 1853, a property-owner there, gives the value of the land in controversy as more than $14,000; and all times since January 1, 1882, above $10,000.

(7.) MARTIN FINNERTY, a farmer, lives in district and precinct adjoining, within a mile of said land, and who owns more than $7,000 worth of land there, says the land in controversy has from January 1, 1882, at all times been worth above $7,000.

(8.) PATRICK REILLY, a policeman, in district and precinct adjoining the line, a man who owns his house, worth over $10,000, within one mile of the land in controversy, places its value above $10,000.

(9.) MATTHIAS W. GALLISTEL, postmaster, business man, and real estate dealer and broker, buying and selling land in same district, who owns his own residence and place of business, worth upwards of $10,000, says this land in contro-

versy from January 1, 1882, has at all times been worth over $10,000.

(10.) JOSEPH M. SPAHN, a business man, living and doing business within a quarter of a mile of the land in controversy, whose property on that corner is worth above $10,000, says the land in controversy has been at all times worth more than $10,000.

(11.) CHRISTOPHER MCLENNAN, a surveyor, who subdivided the land adjoining in 1873 and has surveyed this, gives plats of the locality, printed opposite page 9, and description of the State line monument, and the area in controversy—14.14 acres. Deponent was ten years village engineer of Hyde Park, a village of fifty thousand (50,000), which adjoins this land. He says that within a mile of the land in controversy is a large population, numbering several thousand, two large public schools, churches, post office, depots, &c.; that a street railroad runs within half a mile of the land, and the local suburban trains on two roads run from its border to the center of Chicago, etc.

Deponent bought within a mile, in 1873, and has been selling in lots; still owns 35 lots; is and has been acquainted with the values there, and says that the land in controversy has been at all times from January 1, 1882, worth over $10,000; that he believes that in lots the land would bring $28,000, *twenty-eight thousand dollars*, being $200 each for city lots of the usual size in that vicinity.

(12.) WILLIAM E. MASON, *Member of Congress* from Chicago, knows of the great work done by the Government on the Calumet river within one mile, where are the largest steel rail rolling-mill, the largest nail mill, the largest lumber yard, and one of the largest salt docks in the world. This

land is 42 to 50 minutes from the Board of Trade of Chicago by 20 trains each way.

He thinks the land worth above $500 an acre, or above $7,000, from July 26, 1882.

(13.) DANIEL N. BASH was for 12 years in the real estate business in Chicago; has bought and sold land in the vicinity of the land in question, and knows the value thereof. He has read the affidavit of Hon. William E. Mason, and is acquainted with the great docking and manufacturing enterprises within a mile and a half of the land. He says the land in question is, and from July 26, 1882, has been, worth far more than $500 an acre (that is, far more than $7,000).

(14.) LELIA P. ROBY.—Mrs. Roby, like a good Massachusetts woman, undertook to regulate this case. She has been watching her own lands and sales in the immediate vicinity. She says that at her request her husband went with her to Frederick Eggers' house, and she offered to try to compromise the case about the time it was begun, in 1882, leaving Eggers one-half of the land in controversy and giving the other half to Morgan and Smith, and Eggers answered her, "That half is worth more than fifteen thousand dollars ($15,000), and I am not going to give it up to those rich buggers."

Deponent is acquainted with the value of land in that vicinity; has owned land within a third of a mile of the land in controversy from 1877; has seen lots purchased and paid for at $250 a lot and upwards by above ten purchasers, the purchases exceeding eight acres in area and $20,000 in amount, within a mile of said land, in and since 1884; has been offered $700 each for some of her own lots, and says that the land in controversy has been at all times since

July 1, 1882, worth above $1,000 per acre—that is, above $14,000.

(15.) EDWARD ROBY, in rebuttal, we pass for a space.

(16.) R. W. DUNHAM, Member of Congress from the district embracing the Calumet river and adjoining this land, knows the great improvements done by the United States Government in making that river navigable for the largest vessels of the Great Lakes, and also knows of the great manufacturing interests within a mile of the land in question; also the close connection with the Chicago Board of Trade. He places the value of the land in question at all times from July 26, 1882, above $1,500 an acre.

(17.) CHARLES B. FARWELL (Senator from Illinois) has dictated a similar affidavit. Owing to illness he has been absent from the Senate this afternoon (March 22). Mr. Mason (Member of Congress, whose affidavit is above mentioned) says he will bring this affidavit in, and we shall ask that it be received.

We do not find the printed abstract of affidavits put in by defendant in error to be correct. The following is, we believe, a true statement of such affidavits:

HORACE MARBLE says he has been acting auditor of Lake county, Indiana, and custodian of assessors' books from March, 1884; that it has been the practice and custom of the township assessors and of the board of equalization to assess the value of real estate at two-fifths of its actual value; that the last assessment in the county was made in 1886 and that next previous in 1880.

Affiant is acquainted with the general market value of

lots 1 and 2, section 36, &c., and, in his opinion, said lots were not in the spring of 1885 worth more than $175 per acre, aside from the improvements thereon.

"That said lands are so situated with reference to Lake "Michigan and Cook county, Illinois (that being the county "in which is located the city of Chicago), that at times of "speculative excitement in real estate a speculative value is "ascribed to them which is often in excess of the real or "cash price which they would sell for; but such speculative "values are so fluctuating and temporary that they cannot "be the basis of permanent market price."

Appended is a transcript of the assessment books showing the values at which said lots 1 and 2 were taxed from 1880 to 1887.

This is neither an affidavit nor certificate of value of the lands in controversy. Mr. McLennan's affidavit and plat opposite p. 9, and the Government plat opposite p. 8, show the number of acres in each of said lots, viz., 30.43 acres in lot 1 and 61.50 acres in lot 2. At the value this affidavit gives per acre, lot 1 was worth $5,325.25 and lot 2 was worth $10,762.50, making $16,087.85 the value of the two lots.

The affidavit shows that the assessment for taxation was made in 1880 and six years thereafter, in 1886. The latter only could be used to contradict the affidavits of value involved in this suit. By that the valuation given to lot 1 was $1,500 for land, $700 for improvements—that is, $2,200 for lot 1. The valuation given for lot 2 is $3,997.50. Adding these, the valuation of both lots is $6,197.50. The affidavits accompanying this assessment show this amount is only given as two-fifths of the actual cash value, which computation gives as $15,493.75—

*The affidavit of Mr. Marble being that lots* 1 *and* 2 (*containing* 91.93 *acres*) *were, at the time fixed, worth* $16,087.85 *and the assessment showing them worth* $15,493.75, *and the affidavits produced by plaintiffs in error showing that the* 14 *acres in controversy, parcel of that* 91.93 *acres, were worth more than* $5,000, *these latter affidavits are not in any manner contradicted, nor is any doubt cast upon them by the affidavit of Mr. Marble, the county auditor, and the assessment annexed.*

Again, Mr. Marble's affidavit is that the whole 91.93 acres is worth "$175 per acre, aside from improvements thereon." *Non constat* but there are improvements on the 14 acres worth more than $5,000 and in controversy in the suit.

By an affidavit submitted by plaintiff in error it appears that Mr. Marble's office is some 56 miles by the usual route of travel from the land in question. His residence is not given.

Mr. Marble's affidavit qualifies him to impeach the assessment of which he presents a copy. Affidavit filed by plaintiffs in error and the statute of Indiana show that the assessor's oath is that they will assess at the actual cash value. Mr. Marble swears that the assessment he shows was made at two-fifths of the actual cash value; *therefore it was not made under oath.* It has not the slightest sanction of the law. It is not a legal proceeding.

Indiana Revised Statutes, sec. 6379. "Real property shall "be valued by the assessor as follows: Lands, and the im- "provements and the buildings thereon or affixed thereto, "shall be valued at their *full cash value.*"

SEC. 6386. "Each assessor shall take and subscribe an "oath * * * in the following form:

"I, —— ——, assessor for the township of —— county, in "the State of Indiana, do solemnly swear that the return to "which this is attached contains a correct description of "each parcel of real property within said township so far as "I have been able to ascertain the same; that the value "attached to each parcel in said return is, as I verily believe, "*the full and true cash value thereof.*"

This affidavit of Marble, taken most strongly against the defendant in error, who presents it, exhibits the theory of the defendant's affidavits, namely, that the situation of the lands with reference to Lake Michigan and Cook county and Chicago is not to be considered in estimating its value.

On the other hand, plaintiffs in error insist that *the market value is to be sought in the market*, and not in the wilderness, across lakes, and in remote hamlets distant from the market.

The value of city and suburban property is to be sought among those who know its uses and the prices for which such lands are sold, those who own and are interested in such lands, and not among those whose ignorant prejudice denies all value to them or whose residence and pursuits are such that they cannot come in contact with them.

The affidavit of CHARLES C. SMITH, county treasurer of the county, states that he has custody of the tax duplicates and has read the affidavit of Marble impeaching the assessments, and that the impeaching statements showing that those assessments were not made under oath or under the sanction of the law are true.

He says he lives in Hammond (shown by affidavit filed

by plaintiffs to be six miles from the land in controversy and separated by a lake three miles wide); that he was in 1885 acquainted generally with the market value of the land in North township; "that said lots 1 and 2 during the spring of 1885 were worth not to exceed $175.00 per acre." We have computed that above at $16,087.85. That is not an affidavit that the lands in controversy in this suit were not worth more than $5,000.

The next affidavit is that of FRANK HESS, who says he was assessor; that in making the last assessment "the several assessors of said county met and resolved to assess all the real estate of said county at two-fifths its real or market value, and in pursuance of such resolution affiant, as such assessor, assessed the said lots 1 and 2 at the rates aforesaid."

So the defendant in error has conclusively proved that the assessment he presents was made without oath and without the sanction of the law.

Mr. Hess says he also lives at Hammond, and says "that the market value of said lots 1 and 2 was in 1885 not to exceed $175 per acre." As we have seen, that makes the value of the lots $16,087.85, and is not an affidavit that the 14 acres in controversy, parcel of those lots, is not more than $5,000.

JOHN WANNACOTT gives a description of land probably intended for the land in controversy; says it contains 16.85 acres; says that he owned and bought land in the immediate neighborhood; gives no date, and does not say he ever sold. He says the value does not exceed $100 an acre—$1,685 for the tract.

He says he lives *at Whiting, two and a half miles from said land,* and has resided there for the last 20 years.

(Plaintiff's affidavit shows him a very small farmer or teamster, at times in the employ of Frederick Eggers.)

HENRY REESE, also of *Whiting*, gives the value at $120 per acre—$2,190.50 for the parcel.

FRANK HORBECK, also of *Whiting*, gives $110 per acre—$1,850.50 for the tract.

WILLIAM VATER (a cousin of Frederick Eggers), also of *Whiting*, gives $150 per acre.

HENRY SCHRAGE, also of *Whiting*, gives $155 per acre—$2,631.75 for the tract.

HENRY D. EGGERS (a brother of Frederick Eggers, the defendant), also of *Whiting*, gives $125 per acre—$2,106.25 for the tract.

HERMAN F. VATER (a cousin of Frederick Eggers), also of *Whiting*, gives $120 an acre.

JOHN STENGEL, of *South Chicago*, Cook county, Illinois, lives about one and one-half miles from the land. He limits the value to $120 per acre—$2,222.00 for the tract.

ANDREW SCHMIDT, also of *South Chicago*, limits the value to $100 an acre—$1,685 for the tract.

JOHN KREUTER, of *Sheffield* (one mile from the land), limits the value to $150 an acre.

MARTIN HAUSLER does not give his residence, but limits the value to $130 per acre—$2,190.50 for the tract.

Not an affidavit gives the business of the person making it, except as the first three give the public offices held by the persons, qualifying them by observation to impeach the assessment, as above shown.

In rebutting we have endeavored to present their business and qualifications as well as we can, after having seen the affidavits for the first time here—800 miles from home and from the land in question.

*Rebutting*, the affidavit of the undersigned, sworn to March 20, 1888, shows that till that day he had not seen the affidavits filed by defendant in error; states the law of Indiana requiring assessors to assess the land at its full cash value, referring to the sections of the statutes above quoted, and as to the affidavits filed by defendant in error shows—

That Horace Marble (whose residence is not given) has his office 56 miles, by the usual routes, from the land in question, and that he does not live within many miles thereof.

That Hammond, the residence of Charles C. Smith and Frank Hess, is on section 36, township 37, range 10 west, six and a half miles south of the land in question, and that between Hammond and said land is Lake Wolf, more than three miles wide, and the nearest road from Hammond to the land in question is heavy and sandy, making a detour of some eleven miles to go around said lake.

That John Wannacott is a small farmer or teamster living two and a half miles out in the country beyond said land. Deponent has known him for twelve years, and has known him as a poor man—*an employé of said Eggers, the defendant.*

That the residence of Henry Reese, Frank Horbeck, Henry Schrage, William Vater, Herman F. Vater (two cousins of said Frederick Eggers), and Henry D. Eggers (his brother) is at or near Whiting, 2½ miles out in the country beyond said land; that Whiting is a hamlet of four or five houses, on the Lake Shore road, at which accommodation trains stop, and there is a post office. Its population consists of track-hands and laborers, and there are no stores. It is 2½ miles from the edge of Chicago suburbs

and its population is poor, with no reason to know anything of the value of property in the suburbs of Chicago, having nothing in common with city business or suburban business.

(In that sized place of four or five houses, one family being that of defendant's brother and one or two others his cousins, it is easy to see that the views of value which he presents would be calculated to dominate the opinion of its small population of laborers.)

The affidavit shows that John Kreuter lives at Sheffield station, in the only house at that station, a one-story hovel where hunters sometimes stop. He lives more than a mile out in the country beyond said land and never owned any land, unless it be a little garden.

That Martin Hausler is well known to deponent; that he is a married man with several children; that he lives on the northwest quarter of section 5, township 37 north, range 15 east, and has lived there from 1871. His wife is the daughter of Frederick Eggers, the defendant in error, and his children are the grandchildren of said Frederick Eggers. The affidavit gives the court, the case in equity, the time and place, &c., where said Hausler testified, in December, 1884, that the land adjoining the State-line monument was worth $3,000 an acre, basing his oath on his knowledge of actual sales in that vicinity and on an offer of $3,000 an acre to said Frederick Eggers for all his land in said lot 1, adjoining the State-line monument in Indiana, made by John R. Hoxie, vice-president of the Union Stock-Yards, at Chicago. "If time should be allowed deponent will procure and present a transcript of said testimony of said Hausler, duly certified" under the seal of the court, said testimony being part of the record of said cause in said court.

About the time this suit was brought deponent's wife requested deponent to let her go with deponent to said Frederick Eggers and endeavor to settle the controversy by compromise, as "we own so much land near and will be near neighbors," and in deponent's presence deponent's wife asked said Eggers to divide the land here in controversy and take the north half and let Morgan and Smith have the south half, and said Eggers answered, in deponent's presence, that he would not do that; that either half was worth more than $15,000, and if he gave up the south half he would give up more than $15,000 worth of land, and he would not do that.

Deponent has read the affidavit of Hon. William E. Mason, herewith presented, and deponent says that the matters stated therein as to railroad facilities and manufactures and improvements are true. Twenty-four local trains run each way between the land in question and the heart of Chicago; fares, fourteen cents, &c.; time from board of trade to this land is forty-two to forty-eight minutes. About an equal number of trains, &c., have been run for eight years.

The land in controversy is good land, three-fourths of it being high and dry and one-fourth swamp, but all valuable for the purposes for which land is wanted in that vicinity.

Deponent was offered last week by William K. Ackerman, former president of the Illinois Central railroad and now acting for the Baltimore and Ohio Railroad Company, $1,000 an acre for a strip extending from Eggers' south line to Wolf Lake, near the east line of the section on which said land is situate, 200 feet wide and containing 20 acres, and deponent believes it will be bought by said road within a

month at $1,500 an acre cash. The farmers, &c., at Whiting are not acquainted with the value of such land.

The affidavits of Representative W. E. Mason and Daniel N. Bash (p. 2) show that they have experience which renders them competent to speak on this point, and they say that the opinion of a farmer or other countryman living a mile or more beyond the suburbs is of little or no value as to the value of land situate like this.

It is significant that the defendant, Frederick Eggers, did not add to his affidavit that the land in question is worth less than $5,000. In 1875 he thought $1,500 an acre too little, and actually received that price, and by Hausler's testimony in Cook county, Illinois, circuit court he refused $3,000 an acre. He was willing to get others to make affidavits to low prices, but would himself testify to no such thing.

It is probably unnecessary to refer the Court to the annual appropriations for Calumet river from 1870 to now of $25,000 to $100,000 a year, which are sworn to in this form. The Court will test these affidavits by judicial cognizance of the public laws. Referred to p. 17 post

As testified to, this land adjoins a population of many thousands, with schools, churches, street and steam intramural travel, &c., within a short distance. Mr. Murphy said, March 14, that he lived in the city of Chicago and within a mile of this land. Last fall, by a majority of over 30,000 votes, the city limits were extended to the line of this land, aldermen were elected, and the city took charge. Last Thursday (March 15, 1888) the Illinois supreme court held the act void under which the election was held, the subject not being sufficiently expressed in the title. Still the land is valuable as city land only. Our witnesses are property-owners and business men very near to it, who are well

qualified to speak of its value; and the testimony of a man who has money to invest or who is buying and selling is certainly of much more weight than that of a poor person or one so circumstanced that he has no reason to be interested in values.

Its locality within a mile of the only deep harbor at the head of Lake Michigan makes Mr. Mason and Mr. Dunham (members of the House of Representatives) and Senator Farwell, who are to a great extent responsible to Congress for asserting the need of great appropriations in their district, competent to speak of the work done, of the manufactures, and of the value of the land; besides they are men of large property, acquaintance with city land values, and sound judgment.

Dayton S. Morgan, E. Ashley Smith, Edward Roby, James Tully, Frederick W. Jones, Patrick L. Murphy, Martin Finnerty, Patrick Reilly, Matthias W. Gallistel, Joseph M. Spahn, Christopher McLennan, Daniel N. Bash, and Lelia P. Roby own land close by this in question (thirteen witnesses), are fully qualified to speak, and they put the value away above $7,000, and show the land really worth more than $28,000. Three other men of high character and standing in this nation also testify for us. The *ad damnum* in a declaration, though unsustained by evidence, would be sufficient to give jurisdiction to this Court. In this case the value is proved by overwhelming evidence, and the affidavits of teamsters, &c., living at places remote from the land, to depreciate the value, which were not thought of till after our brief had been received by the counsel for defendant in error, will not weigh a feather to frustrate a hearing on that brief or rob plaintiff in error of $30,000.

EDWARD ROBY, *Counsel.*

| | | | | | | |
|---|---|---|---|---|---|---|
| A. D. | 1871, | 16 Stat., | 539, | for Harbor at Calumet, Ill. | | $50,000 |
| " | 1872, | 17 " | 370, | for improvement of Calumet Harbor | | $40,000 |
| " | 1873, | 17 " | 560, | " | " | $40,000 |
| " | 1874, | 18 " | 237, | " | " | $25,000 |
| " | 1875, | 18 " | 456, | " | " | $25,000 |
| " | 1876, | 19 " | 137, | " | " | $20,000 |
| " | 1878, | 20 " | 156, | " | " | $15,000 |
| " | 1879, | 20 " | 368, | " | " | $12,000 |
| " | 1880, | 21 " | 182, | " | " | $20,000 |
| " | 1881, | 21 " | 471, | " | " | $30,000 |
| " | 1882, | 22 " | 194, | " | " | $35,000 |

A. D. 1882, 22 Stat., 194: "With a view to the improve-
"ment of the Calumet River, in the State of Illinois, from
"its mouth to the fork at Calumet Lake, the Secretary of
"War shall appoint a board of engineers who shall examine
"said river, and report upon the practicability and the best
"method of perfecting and maintaining a channel for
"through navigation to said fork at Lake Calumet, *adapted*
"*to the passage of the largest vessels* navigating the northern
"and northwestern lakes," etc.

| | | | | | | |
|---|---|---|---|---|---|---|
| A. D. | 1884, | 23 Stat., | 135, | for harbor at Calumet, Ill. | | $20,000 |
| " | 1884, | 23 " | 143, | for Calumet River | | $50,000 |
| " | 1886, | 24 " | 315 | " " | Harbor | $10,000 |
| " | 1887, | 24 " | 325 | " " | River | $30,000 |

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

DAYTON S. MORGAN AND E. ASHLEY SMITH,

*vs.*

FREDERICK EGGERS,

No. 200.

## Brief of Defendant in Error on the Main Question.

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W. H. CALKINS,
*Attorneys for Defendant in Error.*

HASSELMAN-JOURNAL CO. PRINT, INDIANAPOLIS.

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## OCTOBER TERM, 1887.

DAYTON S. MORGAN AND E. ASHLEY SMITH,

*vs.*

FREDERICK EGGERS,

No. 200.

*BRIEF OF DEFENDANT IN ERROR ON THE MAIN QUESTION.*

### STATEMENT OF FACTS.

At the expense of repetition we again bring together the dates which are material.

July 26, 1882, plaintiffs in error brought this action.

The land described is all of the north part of lot 2, in section 36, township 38, north range 10 west of the 2d principal meridian, which lies west of the track of the Lake Shore & Michigan Southern Railroad and north of a line parallel with the north line of lot 2, and 753 feet south therefrom.

October 10, 1882, the case was put at issue.

January 20, 1883, by agreement in writing, a jury was waived and the cause was submitted to the court for trial. After trial the following judgment entry was made:

> Come the parties, by counsel, and by agreement this cause is submitted to the Court for trial, and the Court, having heard the evidence, and being duly advised, finds for the plaintiffs, and orders and adjudges that they are entitled to and shall have and recover of defendant the possession of so much of said lot 2 as lies south of the south line of lot number one (1), as indicated by a fence constructed and maintained by the defendant as and on said south line, and assess the damage at $1.00 and costs, taxed at $——, which the plaintiffs shall recover of defendant.
>
> All of which is finally ordered, adjudged and decreed.

On February 5, 1883, a motion was made for a new trial, which was overruled on March 6, 1883.

April 23, 1884 (one year, one month and seventeen days after the motion for a new trial was overruled), a motion was filed in the court below to correct the judgment entry, the denial of which is the subject matter of complaint here.

June 22, 1884, the Court overruled the motion.

January 8, 1885, an appeal bond was filed and the cause brought here by writ of error.

## Argument.

We have already filed a motion to dismiss this writ of error, and supported it with affidavits and a citation of authorities. We do not propose to repeat here what is there said. We propose to discuss the question of the sufficiency of the findings and judgment of the Court, and in doing so, we will not follow counsel for plaintiffs in error through the interminable repetitions, quotations and verbosities, which he has seen fit to inflict upon this Court.

For convenience, we append a rough sketch or map of the land in controversy. (See last page of this brief.)

A glance at the map discloses the fact that lots 1 and 2, in section 36, township 38, range 10 west, constitute the extreme northwestern corner of the State of Indiana. Lots 1 and 2 adjoin each other, and the two together are in the form of a triangle, being bounded on the east by Lake Michigan, and on the west by the Indiana and Illinois State line.

The plaintiffs in error assume in their declaration, a certain line to be the boundary, between lots 1 and 2. They brought their action to recover a certain strip of land south of that assumed boundary, 753 feet wide, extending from the State line east to the Lake Shore & Michigan Southern Railroad.

The defendant in error disputed the correctness of the assumed boundary line between said lots. His contention was that the true boundary line between said lots was a fence which he had erected in the year 1852, and had from thence until the trial maintained. That therefore, if a line drawn parallel with the assumed boundary line, 753 feet south therefrom, would reach a point south of his fence, as he had maintained it for thirty years, he was guilty, as charged in the declaration, of holding possession of only so much

of lot 2 as would be included in the strip 753 feet wide, which lay south of the fence maintained by him; and the unlawful possession in this respect, occurred only because the general issue admitted possession and he was thereby prohibited from showing the contrary.

The actual occupancy and manual possession of all the land north of the fence by the defendant in error for thirty years or more, it was claimed under the Indiana statute, gave him a good title thereto and barred the plaintiffs' action.

We have referred to these contradictory claims because they legitimately grow out of the issues formed as shown in the record. The description of the land, as shown in the declaration—the general denial or general traverse, the judgment entry, and the motion for a new trial—all taken together, indicate the contentions pointed out. If they do not, we take it this Court will presume in favor of the action of the court below on any consistent theory which could be evolved from an examination and consideration of the record. The theories we have advanced may, therefore, be taken as the groundwork upon which to consider the questions presented, either by a construction of the issues joined and the judgment entry, or as a legitimate inference from the pleadings as shown by the record. In either instance the Court will see they are fairly inferrable from the record.

With these suggestions before the Court, we will now discuss the

## Judgment Entry.

Counsel for plaintiffs in error has injected into the record, as copied in his brief, certain parenthetical words by which he divides the judgment entry into three parts:

First parenthesis, (Jury Waived).
Second parenthesis, (Verdict).
Third parenthesis, (Judgment). See his brief, p. 2.

The only purpose which counsel could have had in view by this parenthetical arrangement, must have been to forestall the mind of the Court by making the arrangement catching to the eye. Our contention is that the judgment entry is a finding and judgment run together, instead of being separate and distinct; but that its meaning is perfectly plain, and can not prejudice the plaintiffs in error or any one else. The intent and meaning are so obvious that they can not be misunderstood.

The attempt by counsel to give the judgment entry a forced and strained construction and to divide the sentences arbitrarily, is on a par with the merits of his case. Plaintiffs could not succeed on the evidence, and by undertaking to force a construction exactly opposite to that intended by the Court, they now seek to obtain possession and title to land which they do not own, and to which, it must be presumed, the evidence conclusively showed they had no right.

This is evident from the judgment entry. The record discloses that the proceedings were adversary in their character, and that the parties were present, each making a vigorous fight for his rights. The entry contains all the requisites necessary for a good finding and a good judgment. It exhibits the parties, the subject matter of the dispute and the result; and these facts being definitely ascertained by the entry, the phraseology is unimportant. Whatever the language may be as used in the record, if it is apparent what the finding of the Court was, that finding is correct in law, and a judgment will not be reversed because of the use of untechnical or improper words.

*Lyles* v. *McClure*, 1 Bailey (S. C.) 74;
*Mumford* v. *Hankler*, 19 Ill. 47.
Freeman on Judgments, (1st. Ed.) secs. 47, 50 and 51.

His Honor, Judge Woods, in overruling the motion to correct and reform the entry said:

> The finding and judgment in this instance are not separate and distinct, as perhaps it would have been better to have had them. The meaning, however, is clear. It is as if the entry read: "And the Court having heard the evidence, etc, finds and orders and adjudges that the plaintiffs are entitled to and shall have and recover of the defendant," etc.

Turning now to the judgment entry, it will be seen that it states that the Court finds for the plaintiffs * * that they are entitled to and shall have and recover of defendant the possession of so much of said lot 2 as lies south of the south line of lot No. 1, as indicated by a fence, etc.

If the words "orders and adjudges" are left out, the finding would be complete, and the last line of the entry, to-wit: "all of which is finally ordered, adjudged and decreed," would be a perfect finding and judgment, although somewhat informal. If, however, the finding and judgment are run together, as it is in the entry, that will not destroy it or make it void if the meaning is plain, though the phraseology is imperfect. (Sec. 954, U. S. Stat.)

1. It is evident from the finding and judgment of the Court that only so much of the land described in the declaration which lies south of the south line of lot 1, as indicated by a fence, was awarded to the plaintiffs.

2. It is evident from the entry that the fence was found by the Court to be the south boundary line of lot 1, and, consequently, the north line of lot 2.

3. It is evident from the entry that all the land lying north of the fence in the possession of the defendant was excepted from the finding and judgment in plaintiffs' favor; only so much of lot 2 embraced in the description in the declaration as lies south of the fence was awarded to plaintiffs.

4. It is evident from the judgment entry that the possession of all the land not awarded to the plaintiffs, embraced within the description in the declaration, belonged rightfully to the defendant. And no one can complain of the form of the entry, unless it be the defendant in error. The plaintiffs got all they were entitled to under any state of the case, while the defendant got no affirmative relief, except that which is expressed negatively.

## Statutes of Indiana.

The statute of Indiana which governs this case, and the practice under the Indiana code, which has been adopted by the Federal Courts in this State, is as follows:

> Sec. 1060 R. S. 1881. * * that the plaintiff may recover against one or more defendants the premises, or any part thereof, or interest therein, * * according to the rights of the parties.

This statute does not contemplate two separate and distinct findings. It only contemplates one finding. If the plaintiff is entitled to any part of the premises described in his declaration, the Court shall award him that part. If he is entitled to any interest therein the Court shall award him that interest, according as the rights of the parties appear. Both the finding and judgment under this statute is to be for the plaintiff as to that part or interest to which he may be entitled. There is no separate finding and judgment for the defendant, allowed by the statute, as counsel for plaintiffs in error would have it appear. The risk which a plaintiff takes in describing more land than he is entitled to in his declaration

is that he may have a judgment for only such part as he may show he is entitled to, and thereby deprive himself of the right to avail himself of a new trial as matter of right under section 1064, R. S. 1881. If he does it is his fault, and not the fault of any one else. He can not be heard to complain because he claimed too much in his declaration and only got a part. If he is dissatisfied with the part thus obtained, he must resort to his motion for a new trial as in other cases, and abide the consequences. A new trial of right being a statutory remedy, the right granted is no broader than the statute.

*Butler University* v. *Conrad*, 94 Ind. 353.

## The Finding.

The evidence not being in the record this Court is not informed as to the exact strip of land—or part of the premises described—which the plaintiffs did recover.

The general issue being in, under the practice it was not necessary to prove the defendant's possession. The answer admitted this.

*Carver* v. *Carver*, 97 Ind., 519, (bottom.)

The inference is, therefore, that the 753 feet measured on the State line south from the assumed boundary between lots 1 and 2 reached a point south of the fence mentioned in the entry, and the general denial having admitted possession of that strip, the Court awarded it to the plaintiffs as it was bound to do. This left the defendant in possession of all that part of the land described in the declaration north of the fence and south of the assumed boundary line and between the State line and the Lake Shore railroad. All that counsel say in reference to the finding and judgment of the Court being for land not described in the declaration is therefore inaccurate and misleading. He attempts to show that the finding and judgment embraced land not embraced in issue. But viewed in the light of the facts disclosed, it is clear that the judgment entry is right and does not embrace any land not described in the declaration.

*It is too late to attack the judgment now.*

There is another reason why the plaintiffs in error can not successfully attack the form of the judgment at this time. If we are right in asserting that the judgment entry is valid and binding, although somewhat informal, by reason of having the finding and

judgment run together and "not separate and distinct, as perhaps it would have been better to have had them," but that there is sufficient in the judgment to clearly show what was found and adjudged, then it follows, necessarily, that it is not competent for the plaintiffs in error to attack the form of the judgment as is attempted to be done in this case. The practice in Indiana is well settled on that point; and notwithstanding a judgment entry may be wrong and would be reversed if the proper objection had been taken at the proper time, and the Court had refused to correct the entry when its attention was called to it, yet the Court will refuse to reverse the judgment unless such objection was taken when the judgment was entered. It will not do for an attorney to lie by and allow judgment to be entered up and afterwards question the form of it. This practice would introduce vexatious delays and appeals. The Indiana Supreme Court, in the case of *Buell* v. *Shuman*, 28 Ind. 464, decide this point and announce the true rule in such clear and concise terms that we copy for the convenience of the Court, that part of the opinion as follows:

But the Court, by its judgment, directed execution against the general property of the appellant, for any portion of the indebtedness which might remain unsatisfied by the sale of the mortgaged premises. This, it is argued, was clearly wrong. But no objection was made to it below, and it is, on that ground, insisted by the appellee that the error is not available here. There was, after the judgment, a motion for a new trial upon the ground "that the judgment of the Court is contrary to law and the evidence;" but the motion presented no question whatever for the consideration of the Court below. The courts of New York, under a code from which ours in a great measure was copied, have gone to almost the extent of holding that no question can be considered on error unless it has been distinctly presented to the Court below, and an exception taken to the decision upon it, and this Court has gone far in the same direction. It may be regarded as a general principle, now established under the code, to which there are but few exceptions, that a party must first present a question to the lower Court before he is entitled to the judgment of the appellate court upon it. Under the operation of this rule there is little temptation to parties to permit error to go upon the record by their silence. Attorneys are, in a measure, compelled to become aids to the courts in the correct administration of justice, and litigation in this court, for the mere purpose of vexation or delay, is greatly abridged. The question before us is fully within the reason of the rule and must be governed by it.

The case of *Buell* v. *Shuman* so exactly fits this case that we consider it a waste of time to further discuss this branch.

See also, *Rardon* v. *Walpole*, 38 Ind. 146–50;
*Smith* v. *Dodds*, 35 Ind. 452;
*Leary* v. *State*, 39 Ind. 359;
*Brick* v. *Scott*, 47 Ind. 299–300.

It will be noticed by reference to record, page 3, print, that the plaintiffs in error made no objection to the form of the entry, but allowed it to be recorded, and contented themselves with filing a motion for a new trial on the 5th day of February, 1883. This motion did not recite that the judgment entry was in any way defective, or ask to have it reformed. The motion was overruled on the 6th day of March, 1883. One year and over elapsed before the plaintiffs in error ascertained that the judgment entry was objectionable. The motion, which was filed in the court below to reform the judgment upon which this writ of error is being prosecuted, was not filed until the 23d day of April, 1884.

## An Afterthought.

The motion to correct the judgment, filed on the 23d day of April, 1884, was clearly an afterthought, and is unsupported by any practice known to the code in Indiana, and entirely unsupported by any practice recognized by the courts of the United States.

It will be observed that the motion for a new trial filed by the plaintiffs in error is entirely antagonistic to the theory of the motion made for reformation of the judgment. It is inconsistent with the theory of the trial and progress of the case down to the time when the motion for a new trial was overruled. One of the grounds for which a new trial was asked in the court below was that the plaintiffs in error were surprised by the testimony of certain witnesses with reference to the fence mentioned in the judgment entry being the true line between lots 1 and 2; or that it was the true line between the defendant's land and the land of one Clarke, who, it appears, owned abutting property thereon. This motion upon which this writ of error is prosecuted seeks to have everything in relation to the fence expunged from the record, and on page 82 of his brief plaintiffs' counsel gravely asks this Court to order a judgment entered directly in the teeth of the present judgment entry, and of the facts recited in his motion for a new trial, as shown on pages 3 and

4 of the printed record. This sort of practice, we submit, will not commend itself to the Court. If there is one rule of practice well settled in this State it is that every case must proceed upon a single and consistent theory from beginning to end. In the case at bar the plaintiffs' attorney has changed front completely and is pursuing an antagonistic theory to that which his motion for a new trial clearly points out.

*Lake Erie Co.* v. *Acres*, 108 Ind. 548;
*Henry* v. *Stevens*, 108 Ind. 281;
*Bank* v. *Root*, 107 Ind. 224–8;
*Louisville, etc., Co.* v. *Schmidt*, 106 Ind. 73;
*Leeds* v. *Richmond*, 102 Ind. 372;
*Holderman* v. *Miller*, 102 Ind. 356;
*Over* v. *Scheffling*, 102 Ind. 191;
*Bremmerman* v. *Jennings*, 101 Ind. 253;
*Logansport* v. *Uhl*, 99 Ind. 531;
*Collett* v. *Insurance Co.*, 97 Ind. 311;
*Telegraph Co.* v. *Reed*, 96 Ind. 195;
*Mescall* v. *Tully*, 91 Ind. 96.

## Twenty Years A Bar.

The statute of Indiana in reference to bringing actions to recover the possession of real estate, is as follows:

> The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued and not afterwards. * *
> 6. Upon contracts in writing other than those for the payment of money or judgments of courts of records, and for the recovery of the possession of real estate, within twenty years. (R. S. 1881, Sec. 293.)

We shall not discuss at any great length the effect of the statute of limitations as applied by the courts of Indiana in actions of ejectment. We shall content ourselves by saying that it abundantly appears from the fragmentary record in this case that the principal contention of the defendant was an adverse possession for more than twenty years. That possession was bounded upon the south by a fence constructed by the defendant on the line dividing lots 1 and 2, and maintained by him from thence till the day of the trial. The plaintiffs in error assumed in their declaration—as well as in their proof—which is clearly inferrable from the record—that a line nearly 750 feet north of this fence was the true boundary line between lots

1 and 2. To enable the Court to determine whether and to what extent the defendant was guilty, if at all, of unlawful possession of any part of plaintiffs' land, the first subject of inquiry was, which was the true boundary between those two lots? The judgment entry recites that the fence was on the line dividing lots 1 and 2.

The evidence as to the possession of this land by the defendant is not in the record, and, in such cases, every presumption will be indulged by this Court in favor of the trial-court for the purpose of maintaining the judgment entry. Sufficient appearing, therefore, to apprise this Court that that issue was made, we take it the Court will presume that the trial-court intended to find, and did find, that the defendant, Eggers, had been in adverse possession of so much of the land in controversy, as was indicated by a fence running from the State line to Lake Michigan, and which the defendant, Eggers, had maintained for more than twenty years next before the bringing of this action. This defense was proper to be made in this action; for twenty years' possession is held to convey as complete a title to the tenant in possession as a warranty deed from the owner.

The Supreme Court of this State say that—

> His title is created by the existence of the facts and not by the exhibition of them in evidence. An open, notorious, exclusive and adverse possession for twenty years would operate to convey a complete title to the plaintiffs as much as any written conveyance. And such title is not only an interest in land, but it is one of the highest character—the absolute dominion over it, etc.

*Bowen* v. *Preston*, 48 Ind. 367.

It is a rule of property in this State that the possession need not be adverse. That the statute begins to run when the tenant takes possession under claim of ownership, whether such claim is known to the real owner or not.

*Vanduyn* v. *Hepner*, 45 Ind. 596.

It has been held that the Statute of Limitations, according to the section under consideration, does not begin to run until the right of action accrues, and in the case of an action for the possession of real estate, the right of action does not accrue until there is a right of entry.

*Wright* v. *Tichnor*, 104 Ind. 185.

It is true that the Supreme Court of the State has held and does now hold that where there is no color of title, the land is limited to the palpable possession and acts of ownership which the tenant exercises. But where there is color of title, the possession is co-extensive with the boundaries of the muniments of title under which he enters.

*State* v. *Portsmouth Savings Bank*, 106 Ind. 436.

## Mandamus Case.

In *Ex parte Morgan & Smith*, 114 U. S. 174, counsel asserts in his brief, on pages 4 and 23, that this Court decided that plaintiffs in error had a right to a writ of error to review this judgment for error occurring on the face of it. As usual, the plaintiffs' counsel is much in error in making this assertion. This Court, in that case, did not decide any such question. It only decided that the petitioners in the mandamus case could not successfully maintain their right to compel the trial-court to enter a particular judgment, which the petitioners then asked. That if they had any rights it was by way of writ of error and not by mandamus.

## Plaintiffs' Inaccuracies.

In the face of the record containing a copy of plaintiffs' declaration, their counsel avers that there was averment of damages in the declaration and no issue on the amount. As usual, this is inaccurate. The declaration laid the damages at $2,000, and the issue was joined on the whole complaint. The practice in Indiana, since 1852, has been and is now to award damages for unlawfully keeping a rightful party out of possession, and thus settle the whole controversy in one case.

Sec. 1058, R. S. 1881.

*Woodruff* v. *Garner*, 27 Ind. 4.

On page 27 of plaintiffs' brief, several cases are cited by counsel to maintain the proposition that a judgment may be corrected to conform to the verdict. We have read the cases cited by counsel and none of them are in point in this case, for the very good reason that the verdict and judgment are consistent in the case at bar, and the subject discussed in some of the cases cited by counsel was where the verdict and judgment were inconsistent. But it will serve no

useful purpose, as we think, to weary the patience of this Court by pointing out the many inaccuracies in which counsel has indulged, or to pursue the phantoms which appear to have passed in review before his fertile imagination. One thing, perhaps, we ought to say, and that is that his attack upon Judges Gresham and Woods is entirely unjustifiable.

### Unnecessary Reflections.

On page 28 of his brief, counsel sneers at Judge Woods by saying that "he evidently thinks there is no distinction between the functions of the judge and the clerk." And on page 40 he charges him with "guessing" at what the record intended. On page 80 of his brief, he hides behind an "if" in making a covert attack upon Judge Gresham.

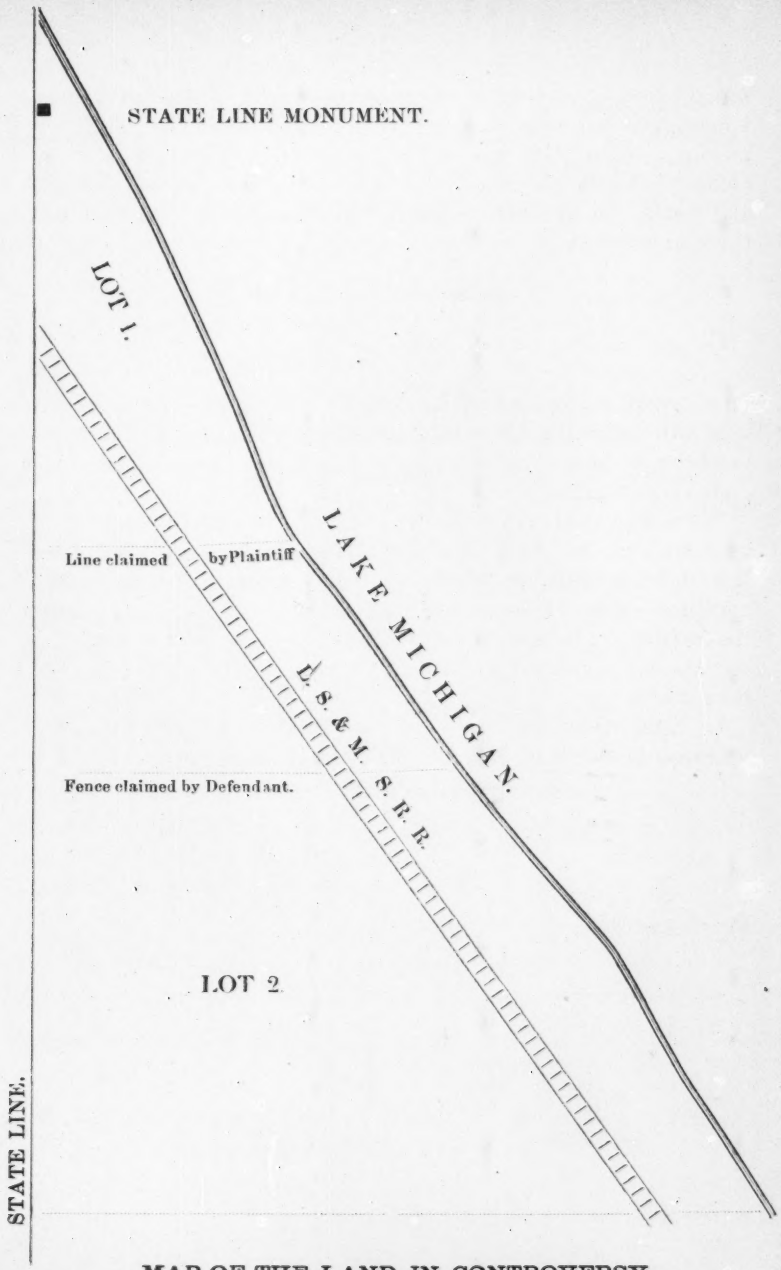
We submit that such remarks are out of place and ought not to have been made. In honor of our profession, we are glad to say that such unjustifiable attacks are rarely found in briefs filed in appellate courts. It is not too much to say that it is known to all the members of this court, that the two judges referred to are high-minded and impartial jurists, and fearless in the performance of their duties.

In considering the whole case, we think it apparent that the judgment of the court below ought to be affirmed.

Respectfully submitted,

A. C. HARRIS,
W. H. CALKINS,
*Attorneys for Defendant in Error.*

March 14, 1888.




MAP OF THE LAND IN CONTROVERSY.

24-63

Office Supreme Court U. S.
FILED.
MAR 19 1888
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CLERK

IN THE

# Supreme Court of the United States,

## OCTOBER TERM, 1887.

No. 200.

DAYTON S. MORGAN AND A. ASHLEY SMITH,
PLAINTIFFS IN ERROR,
*vs.*
FREDERICK EGGERS,
DEFENDANT IN ERROR.

## DEFENDANT'S ABSTRACT OF FACTS, AS SHOWN BY AFFIDAVITS.

A. C. HARRIS,
WM. H. CALKINS,
*For Defendant in Error.*

Hasselman-Journal Co. Print.

IN THE

# Supreme Court of the United States,

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DEFENDANT'S ABSTRACT OF FACTS SHOWN BY AFFIDAVITS.

### ABSTRACT OF AFFIDAVITS FILED IN SUPPORT OF 2ND GROUND FOR DISMISSAL OF THIS WRIT OF ERROR.

Since filing the motion for defendant in error to dismiss this cause, we have been informed by Mr. Roby, counsel for plaintiffs in error, that he will file affidavits tending to show that the land in controversy was worth more than the sum of five thousand dollars ($5,000) at the date of the rendition of judgment in the court below. Not having seen said affidavits, nor being advised of the purport of the same, and being entirely in the dark in reference to what they state, for the purpose of meeting any claim that may be made that the land in controversy was of the value of $5,000 at the date of the rendition of the said judgment, we submit herewith the following affidavits; and for the convenience of this Court we make the following summary of the affidavits thus filed.

There are 16 and 85-100 acres of land in controversy.

We first submit the affidavit of

HORACE MARBLE,

The Auditor of Lake county, Indiana. By virtue of his office he has in his possession as such Auditor the tax records of the county. Aside from these tax records he has a knowledge of the value of lands situate in that part of the county where the land in controversy is located. He states in his affidavit that he considers the land worth $175.00 an acre. He also states that by reason of the land being close to Cook county, Illinois, and not far from Chicago, it has sometimes in the market a commercial or speculative value very far exceeding its actual cash value. That "said lands are so situate in reference to Lake Michigan and Cook county, Illinois, (that being the county in which is located the City of Chicago), that at times of speculative excitement in real estate, a speculative value is ascribed to them (the lands) which is often in excess of the real or cash price which they would sell for; but such speculative values are so fluctuating and temporary that they can not be made the basis of permanent market price."

It is further shown by the official statement of this officer that in in 1882, 1883, 1884 and 1885, lot 2, containing 61 and 50-100 acres, was assessed for taxation at $922.50; that this valuation was two-fifths of its actual value, which would make the cash valuation of the land during those years $2,306.25.

Mr. Marble is not related to Mr. Eggers, and has no interest in this controversy.

CHARLES C. SMITH

Is the County Treasurer of the county and collects all of the taxes. His affidavit states that he has read over Mr. Marble's affidavit and fully concurs with him; that he also has knowledge of the official statements made by Mr. Marble, which Mr. Smith verifies. Mr. Smith further gives the rate for taxation at which the land was taxed for those years, being a little less than $1.50 on each $100.00. He further testifies in his affidavit that he lives at Hammond, a town just south of this land, and was dealing in real estate prior to his election, and especially in the spring of 1885. He puts the actual cash value of the land at $175.00 an acre. Mr. Smith is not

related to Mr. Eggers, and has no interest in the subject-matter of this action.

FRANK HESS

Is the Assessor of lands for taxation in that township. He is also a resident, and has been of that township, for thirty years last past. He swears he is acquainted with the values of real estate and especially with this. Mr. Hess gives it as his judgment that the real cash value of the lands in controversy is about $175.00 an acre, and that in his assessment it was assessed at two-fifths of its actual value under an agreement by all of the appraisers of the county—the law authorizing them to equalize valuations in that way.

JOHN WONNACOTT,

A neighbor of the defendant in error, who owns lands in close proximity to said defendant's land, estimates its value at only $100.00 per acre. He further says that he has owned and bought land in the immediate neighborhood of the land in controversy, and that he lives close by it and has for many years. That there are no improvements on the land except some small fences, a dwelling house and out-buildings, and a few fruit trees.

HENRY REESE

States that he knows the value of this land, and has for thirty years. He places the value of the land at $130 an acre; says it is the land upon which Eggers lives, and that he is acquainted with its value.

FRANK HORLBECK

Testifies that he knows the land, and has since January, 1880. He also lives in the neighborhood, and has since that time, and says the land is not worth to exceed $110 per acre; that within five years last past he has bought, and now owns, real estate in the neighborhood of the land in controversy, and therefore is acquainted with the values.

WILLIAM VATER

Swears that he has been acquainted with the values of land in the neighborhood where this land lies for fifteen years last past. He

also lives in the neighborhood, and places the value of the land at not exceeding $150.00 per acre.

HENRY SCHRAGE

Swears that he is acquainted with the values of the land in controversy, and has been for twenty years last past. He also lives in the neighborhood, and has for a long time, and says that the land is not worth to exceed $155.00 an acre. He describes where the land lies, and says he is familiar with it.

JOHN STENGEL

Swears that he is acquainted with the land and its value, and the value of land in the vicinity of it. He puts the value at not exceeding $120.00 an acre. He also has bought, and owns, land in the neighborhood of this land.

JOHN KREUTER

Has known the value of this land, and lived in the neighborhood for fifteen years prior to the date of the rendition of this judgment. He says that he is acquainted with the value, and puts it at not exceeding $150.00 per acre.

HENRY D. EGGERS,

A brother of the defendant in error, states that he is acquainted with the value of this land and of the lands in close proximity to it, and has been for the last thirty five years. He puts the value at $135.00 an acre. He also states that he has bought and sold real estate during that period, and now owns real estate close to this, and is therefore acquainted with the value.

HERMAN F. VATER

Swears that he is acquainted with the land in controversy, and has been for seven years prior to the date of the rendition of the judgment. He puts the value at not exceeding $120.00. He also lives in the neighborhood, and says he is familiar with the land and its value.

ANDREW SCHMIT

Resides at South Chicago, only a few miles from the land, and says he is acquainted with the market value of the land in controversy, and has been for more than ten years last past; that it was not worth at the date of the rendition of the judgment, to-wit, January 13, 1885, to exceed $100.00 per acre. He further says that he has bought and sold real estate in the neighborhood where the land lies, and knows the values.

MARTIN HAUSLER

Resides at South Chicago, a few miles from this land, and swears he has known the land since 1862. He puts the value of the land at not exceeding $130.00 an acre. He testifies that he has bought and sold land during said time in the neighborhood of this land, and therefore is acquainted with its value.

None of these witnesses are related to the defendant in error, so far as is shown, or have any interest in the matter in controversy, except his brother, before mentioned.

The values, as stated by the witnesses, extend to the whole of lots one (1) and two (2), in section thirty-six (36), township thirty-eight (38) north, range ten (10) west; but there is only 16 and 85-100 acres in controversy. The computation of values, therefore, is easily made by the Court. Taking the highest sum at $175.00 and the lowest sum at $100.00 an acre, the average is $137.50 an acre; 16 and 85-100 acres at this price shows a total of $2,316.50.

Unquestionably many affidavits can and will be procured, showing that the land has a speculative value far exceeding this sum. Some real estate agents who are dealing largely in real estate, may run the price of the land up as high as $1,000 an acre. This, however, is explained in Mr. Marble's affidavit, and shows very clearly that the prices thus made are fictitious, fluctuating and uncertain. That the market price or value of land can not be calculated on any such uncertain and fictitious basis; that the real estate speculators boom the prices one day and depress them the next, and cause fluctuations which are unsteady and unreliable. The real reliable basis upon which to make calculations is that given by the tax officers, whose sworn duty it is to appraise lands without fear or favor

for taxation, and this appraisement shows that the value of the 16 and 85-100 acres in controversy is not far from $175.00 an acre. This, probably, is the nearest accurate value that can be ascertained. The neighbors and friends of the defendant in error do not consider it worth so much; and the real estate speculators and men who are engaged in booming suburban property, will undoubtedly put it a great deal higher. But the level of the whose business, as it seems to us, ought to be taken from the tax assessment and the sworn officers, whose duty it is to appraise real estate for taxation.

Respectfully submitted,

A. C. HARRIS,
W. H. CALKINS,
*For Defendant in Error.*

127-63

127-63

Supreme Court U. S.
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FEB 17 1888
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IN THE

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OCTOBER TERM, 1887.

DAYTON S. MORGAN AND E. ASHLEY SMITH, PLAINTIFFS IN ERROR,
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} No. 200.

## Brief and Argument in Support of Motion to Dismiss the Writ of Error.

A. C. HARRIS,
W. H. CALKINS,
*Attorneys for Defendant in Error.*

Hasselman-Journal Co. Print, Indianapolis.

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Respectfully submitted,

A. C. HARRIS,
W. H. CALKINS,
*For Defendant in Error.*

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*vs.*
FREDERICK EGGERS.
No. 200.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

*Motion of defendant in error, Frederick Eggers, to dismiss the writ of error in this action.*

And said defendant in error, Frederick Eggers, comes and moves the Court here to dismiss the writ of error in this behalf granted, and for cause said defendant in error shows:

1. That the record in this action as now here presented by said plaintiffs in error does not show that the matter in dispute exceeds the sum or value of five thousand dollars ($5,000) exclusive of costs, as required by the act of Congress of February 16, 1865. (1 Sup. R. S. U. S. p. 136.)

2. The land in controversy, in fact, is not, and was not at date of the rendition of the judgment, worth the sum of $5,000.

3. Because the record sets forth that the writ of error was attempted to be sued out from an order refusing to correct a judgment made and entered by the trial court after trial had and after the hearing of evidence in regular and due form, and the evidence so heard is not set out and brought here by bill of exception or otherwise, and that, therefore, there is nothing from which a writ of error will lie.

And so this defendant in error says that said writ of error does not present any question of law or fact cognizable or reviewable by this Court.

Respectfully submitted,

FREDERICK EGGERS,
By W. H. CALKINS, *his Attorney.*

A. C. HARRIS, *of Counsel.*

# In the Supreme Court of the United States.

## OCTOBER TERM, 1887.

DAYTON S. MORGAN AND E. ASHLEY SMITH, PLAINTIFFS IN ERROR,
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FREDERICK EGGERS.
No. 200.

BRIEF AND ARGUMENT IN SUPPORT OF MOTION TO DISMISS THE WRIT OF ERROR.

In order that the Court may be fully apprised of the facts appearing in the record, we submit the following concise statement:

On the 26th day of July, 1882, Dayton S. Morgan and E. Ashley Smith, plaintiffs in error, filed in the Circuit Court of the United States, for the District of Indiana, a declaration in ejectment against Frederick Eggers, the defendant in error.

Plaintiffs are citizens of the State of New York, and the defendant is a citizen of the State of Indiana.

The land sought to be recovered is described in the declaration as "All of the north part of lot 2, in section 36, township 38 north, of range 10 west, of the 2d Principal Meridian, which lies west of the track of the Lake Shore & Michigan Southern Railroad, and north of a line parallel with the north line of said lot 2, and 753 feet south therefrom."

At the May term of said Circuit Court of the United States, on the 10th day of August, 1882, a rule was taken against the plaintiffs to make profert of their chain of title, (called in the Indiana practice a motion to furnish an abstract of title); which rule was discharged on the 31st day of August, 1882. (Print. R. p. 2.)

At the same term and on the 10th day of October, 1882, the defendant in error filed his answer to the declaration of the plaintiffs,

being a general traverse of all the material allegations of the complaint and called in the Indiana practice a general denial. (Pr. R. p. 3.)

Afterwards, to-wit, at the November term of said Court, and on the 20th day of January, 1883, the cause, by agreement in writing, was submitted to the Court for trial, and the intervention of a jury was waived. (See Stip. Pr. R. p. 3.)

And on that day the evidence was adduced, arguments were heard, and the Court made and caused to be entered the following judgment entry, to-wit:

"Come the parties, by counsel, and by agreement this cause is submitted to the court for trial, and the Court, having heard the evidence and being duly advised, finds for the plaintiffs, and orders and adjudges that they are entitled to and shall have and recover of defendant the possession of so much of said lot 2 as lies south of the south line of lot number one (1), as indicated by a fence constructed and maintained by the defendant as and on said south line, and assesses the damage at $1.00 and costs, taxed at $——, which the plaintiffs shall recover of defendant.

All of which is finally ordered, adjudged, and decreed."

On the 5th day of February, 1883, a motion for a new trial was filed by the plaintiffs in error, (Pr. R., p. 3,) which was overruled at the same term of the Court on March 6, 1883, (Pr. R., p. 4.)

The plaintiffs in error here then allowed the matter to rest until the 23d day of April, 1884, (one year, one month and seventeen days,) when they appeared and filed a motion to have the judgment entry amended and reformed so as to conform to the complaint and to the finding or verdict of the Court, rendered in said cause. (Pr. R., p. 4.)

The parties appeared after notice, and on the 27th day of June, 1884, the Court overruled the motion and gave an opinion in writing, found at bottom of (Pr. R., p. 5,) and top of (Pr. R. p. 6,) in these words:

"The plaintiffs now insist that there is an unqualified general finding for the plaintiff, and that in conformity with this, the judgment should have been for the recovery of the land as described in the complaint, and that so much of the description set forth in the judgment as refers to the fence constructed by the defendant should be expunged.

"It was competent for the Court, under the issue, to find to what extent the defendant was guilty, or had held unlawful possession of the premises described, and if under the evidence it appeared that a fence had

become or was the boundary of such occupation, it was proper that the fact should be stated in finding and judgment of the Court.

"The finding and judgment in this instance are not separate and distinct, as perhaps it would have been better to have had them. The meaning, however, is clear."

It is as if the entry read in this way:

"And the Court, having heard the evidence, etc., finds and orders and adjudges that the plaintiffs are entitled to and shall have and recover of the defendants, etc.

"The motion for correction is therefore overruled."

Here the matter rested until the 8th day of January, 1885, when an appeal-bond was filed and approved, and a writ of error was sued out of the Court and the cause brought here.

## Argument.

It nowhere appears by the record that the land in controversy was worth or had a money value of $5,000 at the time of the rendition of the judgment. The burden of proving the amount in controversy sufficient to sustain jurisdiction on error is upon the party seeking a revision. Sufficient value should appear on the record or be shown by affidavit.

*Hagen* v. *Farson*, 10 Pet. 160.

The writ of error will always be dismissed on motion, where the matter in dispute is below the amount necessary to give this Court appellate jurisdiction.

*Winston* v. *United States*, 3 How. 771;
*D'Arcy* v. *Ketcham*, 11 How. 165;
*Gray* v. *Blanchard*, 97 U. S. 554;
*Banking Associations* v. *Insurance Co.*, 102 U. S. 121.

In the next place the Statutes of Indiana provide as follows:

* * * * * * * * * *

"That the plaintiff may recover against one or more defendants the premises or any part thereof or interest therein * * * according to the rights of the parties." (R. S. 1881, sec. 1060.)

The Supreme Court of Indiana has recently construed this statute and held, in a case involving the question whether a part of the prem-

ises might be recovered by a plaintiff in an action of ejectment, that such a judgment was proper, and that the statute above referred to made it the duty of the Court to render a judgment for a part of the premises if the evidence showed the plaintiff entitled to such part only.

The Court say:

"The statute in relation to the recovery of real property and the settling of conflicting claims thereto, provided and still provides that where there are two or more plaintiffs or defendants, any one or more of the plaintiffs may recover against any one or more of the defendants, *the premises or any part thereof, or any interest therein*, or damages according to the rights of the parties, but the recovery may not be for a greater interest than that claimed (citing the above section.) Clearly under this section a plaintiff suing for the possession of real estate may recover for any part of it or interest therein, whether a divided or undivided interest."

*Carver* v. *Carver*, 97 Ind. 497-505.
*Steeple* v. *Downing*, 60 Ind. 478-503.
*Parker* v. *Small*, 58 Ind. 349.
*Clements* v. *Robinson*, 54 Ind. 599.

The error pointed out by the plaintiffs in error relates solely to the form of the judgment. The construction given to the judgment in the written opinion overruling the motion to amend and correct it states the effect of the judgment in appropriate terms, and leaves nothing from which a writ of error may be prosecuted.

The defendant in error therefore asks that the same may be dismissed.

Respectfully submitted,

A. C. HARRIS,
W. H. CALKINS,
*Attorneys for Def't in Error.*

27-64

# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1387.

CHARLES H. PAGE, APPELLANT,

*vs.*

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 10, 1888.

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1887.

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CHARLES H. PAGE, APPELLANT,

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INDEX.


| | Original. | Print. |
|---|---|---|
| Petition, filed March 21, 1887 | 1 | 1 |
| Motion to amend petition and allowance of same, M'ch 31, 1887 | 2 | 2 |
| Traverse, filed April 9, 1887 | 3 | 2 |
| Findings of fact and conclusion of law, filed Dec. 12, 1887 | 4 | 2 |
| Opinion of the Court | 6 | 4 |
| Judgment of the Court dismissing petition | 8 | 6 |
| Application of claimant for and allowance of an appeal | 9 | 6 |
| Certificate | 10 | 7 |


JUDD & DETWEILER, PRINTERS, WASHINGTON, MARCH 10, 1888.

1 I.—*Petition. Filed March* 21, 1887.

In the Court of Claims.

CHARLES H. PAGE
*vs.*
THE UNITED STATES. } 15594.

To the honorable the Court of Claims:

The plaintiff in the above-entitled cause, respectfully complaining, shows to this honorable Court that he is a citizen of the United States and an inhabitant of the State of Rhode Island.

That on the twenty-first day of February, 1887, he was duly elected a Representative in the 49th Congress from the second district of Rhode Island (and was sworn in as such).

That as such Representative he became entitled to pay at the rate of five thousand dollars per annum, as provided by law.

That he has received from the defendant on account of the pay so due him the sum of five hundred and thirty-one dollars and 82 cents ($531.82).

That there is due to the claimant from the defendant by reason of the premises the further sum of nine thousand four hundred and sixty-eight dollars and 18 cents ($9,468.18), and that he is justly entitled to the amount of this claim, after allowing all just credits and offsets.

Wherefore the plaintiff prays for judgment against the United States for the said sum of nine thousand four hundred and sixty-eight dollars and 18 cents ($9,468.18).

ALLAN RUTHERFORD,
*Plaintiff's Attorney.*

STATE OF RHODE ISLAND, } *ss:*
*County of Providence,* }

Charles H. Page, being duly sworn, says that he is the claimant in the above-entitled action; that he has read the foregoing petition and knows the contents thereof; that no assignment or transfer of said claim or any part thereof or interest therein has been made, and that he is justly entitled to the amount thereof, after allowing all just credits and offsets, and that the facts as stated in said petition are true.

CHARLES H. PAGE.

Sworn and subscribed to before me this nineteenth day of March, A. D. 1887.

Witness my hand and seal.

[SEAL.] PATRICK J. McCARTHY,
*Notary Public.*

Post-office address of claimant is 19 College street, Providence, Rhode Island.

Post office of claimant's attorney, Allan Rutherford, is Washington, D. C.

1—1387

2 II.—*Motion to Amend Petition. Filed and Allowed March* 31, 1887.

And now comes the above-named claimant, by Allan Rutherford, his attorney, and moves the Court for permission to amend his petition by inserting the words "and was sworn in as such" after the words "district of Rhode Island," in the sixth line of said printed petition.

Washington, D. C., March 31, 1887.

ALLAN RUTHERFORD,
*Claimant's Att'y.*

No objection to this amendment.

ROBERT A. HOWARD,
*Ass't Att'y General.*

Allowed:

WM. A. RICHARDSON,
*Chief Justice.*

3 III.—*Traverse. Filed April* 9, 1887.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

ROBERT A. HOWARD,
*Ass't Attorney General.*

4 IV.—*Findings of Fact and Conclusion of Law. Filed December* 12, 1887.

This case having been heard by the Court of Claims, the Court, upon the evidence, find the facts to be as follows:

I.

An election was held November 4, 1884, for the purpose of electing, by the people, a Representative to the Forty-ninth Congress for the second congressional district of Rhode Island.

II.

The General Assembly of said State, the 7th day of January, 1855, in grand committee, counted the vote and declared William A. Pirce elected, whereupon the Governor of the State of Rhode Island delivered to him the following certificate of election, to wit:

By his excellency, Augustus O. Bowen, Governor, captain-general, and commander-in-chief of the State of Rhode Island and Providence Plantations:

Be it known that William A. Pirce, of Johnston, in the State aforesaid, qualified according to the Constitution of the United States for a Representative in the Congress thereof, was, by the people of the second district of said State, having the qualifications requisite for electors of the most numerous branch of the Legislature thereof, on the 4th day of November, A. D. 1884, regularly elected a Representative from said State in the Forty-ninth Congress of the United States, in accordance with the laws of said State.

In testimony whereof I have hereunto set my hand and caused the seal of said State to be affixed at Providence, this ninth day of January, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States of America the one hundred and ninth.

[SEAL.] AUGUSTUS O. BOWEN.

By the Governor:

JOSHUA M. ADDEMAN,

*Secretary of State.*

Mr. Pirce was sworn in and took his seat in the Congress of the United States March 4, 1885.

III.

February 5, 1885, Charles H. Page served notice on said William A. Pirce that he contested his election to the office of Representative in the Forty-ninth Congress of the United States for the second congressional district of Rhode Island.

5 IV.

January 25, 1887, the House of Representatives of the Congress of the United States agreed to the following resolution, to wit:

Resolved, That William A. Pirce was not elected a member of the House of Representatives of the Forty-ninth Congress from the second congressional district of Rhode Island, and that the seat be declared vacant.

An election thereafter was held in the said State of Rhode Island to fill said vacancy.

V.

February 25, 1887, the certificate of election of Charles H. Page to the House of Representatives, Forty-ninth Congress, for the second congressional district of Rhode Island, was presented to said House, and reads as follows:

By his excellency George Peabody Wetmore, Governor, captain-general, and commander-in-chief of the State of Rhode Island and Providence Plantations:

Be it known that Charles H. Page, of Scituate, in the State aforesaid, qualified according to the Constitution of the United States for

2 II.—*Motion to Amend Petition. Filed and Allowed March* 31, 1887.

And now comes the above-named claimant, by Allan Rutherford, his attorney, and moves the Court for permission to amend his petition by inserting the words "and was sworn in as such" after the words "district of Rhode Island," in the sixth line of said printed petition.

Washington, D. C., March 31, 1887.

ALLAN RUTHERFORD,
*Claimant's Att'y.*

No objection to this amendment.

ROBERT A. HOWARD,
*Ass't Att'y General.*

Allowed:

WM. A. RICHARDSON,
*Chief Justice.*

3 III.—*Traverse. Filed April* 9, 1887.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

ROBERT A. HOWARD,
*Ass't Attorney General.*

4 IV.—*Findings of Fact and Conclusion of Law. Filed December* 12, 1887.

This case having been heard by the Court of Claims, the Court, upon the evidence, find the facts to be as follows:

I.

An election was held November 4, 1884, for the purpose of electing, by the people, a Representative to the Forty-ninth Congress for the second congressional district of Rhode Island.

II.

The General Assembly of said State, the 7th day of January, 1855, in grand committee, counted the vote and declared William A. Pirce elected, whereupon the Governor of the State of Rhode Island delivered to him the following certificate of election, to wit:

By his excellency, Augustus O. Bowen, Governor, captain-general, and commander-in-chief of the State of Rhode Island and Providence Plantations:

Be it known that William A. Pirce, of Johnston, in the State aforesaid, qualified according to the Constitution of the United States for a Representative in the Congress thereof, was, by the people of the second district of said State, having the qualifications requisite for electors of the most numerous branch of the Legislature thereof, on the 4th day of November, A. D. 1884, regularly elected a Representative from said State in the Forty-ninth Congress of the United States, in accordance with the laws of said State.

In testimony whereof I have hereunto set my hand and caused the seal of said State to be affixed at Providence, this ninth day of January, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States of America the one hundred and ninth.

[SEAL.] AUGUSTUS O. BOWEN.

By the Governor:

JOSHUA M. ADDEMAN,

*Secretary of State.*

Mr. Pirce was sworn in and took his seat in the Congress of the United States March 4, 1885.

III.

February 5, 1885, Charles H. Page served notice on said William A. Pirce that he contested his election to the office of Representative in the Forty-ninth Congress of the United States for the second congressional district of Rhode Island.

5 IV.

January 25, 1887, the House of Representatives of the Congress of the United States agreed to the following resolution, to wit:

Resolved, That William A. Pirce was not elected a member of the House of Representatives of the Forty-ninth Congress from the second congressional district of Rhode Island, and that the seat be declared vacant.

An election thereafter was held in the said State of Rhode Island to fill said vacancy.

V.

February 25, 1887, the certificate of election of Charles H. Page to the House of Representatives, Forty-ninth Congress, for the second congressional district of Rhode Island, was presented to said House, and reads as follows:

By his excellency George Peabody Wetmore, Governor, captain-general, and commander-in-chief of the State of Rhode Island and Providence Plantations:

Be it known that Charles H. Page, of Scituate, in the State aforesaid, qualified according to the Constitution of the United States for

a Representative in the Congress thereof, was, by the people of the second district of said State, having the qualifications requisite for electors of the most numerous branch of the Legislature thereof, on the 21st day of February, A. D. 1887, regularly elected a Representative from said State in the Forty-ninth Congress of the United States, in accordance with the laws of said State, to fill the vacancy caused by the action of the national House of Representatives in declaring the seat of William A. Pirce vacant.

In testimony whereof I have hereunto set my hand and caused the seal of the State to be affixed, at Providence, this 23d day of February, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States of America the one hundred and eleventh.

[SEAL.] GEO. PEABODY WETMORE.

By the Governor:

JOSHUA M. ADDEMAN,

*Secretary of State.*

Whereupon Charles H. Page was sworn in and took the seat formerly occupied by said Pirce.

VI.

William A. Pirce occupied the seat in the Forty-ninth Congress, House of Representatives, from the second congressional district of Rhode Island, from March 4, 1885, to January 25, 1887; was recognized as the sitting member, voted, served on committees, and drew the salary for that time, amounting to $9,468.18; also received mileage in the sum of $344.

VII.

Charles H. Page occupied the seat in the Forty-ninth Congress, House of Representatives, from the second congressional district of Rhode Island, from February 25, 1887, to March 3, 1887; was recognized as the sitting member for that time; voted, served on committees, and drew salary from January 25, 1887, to March 3, 1887, amounting to $531.82; also received mileage in the sum of $175.20.

*Conclusion of Law.*

Upon the foregoing facts the Court find, as conclusion of law, that the petition be dismissed.

6 V.—*Opinion of the Court.*

DAVIS, *J.*, delivered the opinion of the court:

In November, 1884, an election was held in Rhode Island, one of the results of which was that William A. Pirce received from the Governor a certificate, in due form, that he had been elected a member of the House of Representatives of the Forty-ninth Congress from the second congressional district of that State. Mr. Pirce was accordingly sworn in and took his seat in that body. The claimant in this case contested the election and, in January, 1887, the House resolved

that Mr. Pirce was not elected, and declared the seat vacant. A second election was then held; claimant was elected, took his seat in the House, and received his mileage and his salary as Representative from the date of the resolution declaring the seat vacant until the expiration of the Congress. He claims in this action salary during the period when Mr. Pirce occupied the seat, upon the ground that as the latter was declared "not elected" and as the seat was declared "vacant" claimant's "predecessor" was not Mr. Pirce, but the Representative from his congressional district who sat in the Forty-eighth Congress. This contention is based upon section 51 of the Revised Statutes, which reads as follows:

Whenever a vacancy occurs in either House of Congress, by death or otherwise, of any member or delegate elected or appointed thereto after the commencement of the Congress to which he has been elected or appointed the person elected or appointed to fill it shall be compensated and paid from the time that the compensation of his predecessor ceased.

Section 49 of the Revised Statutes is also relied upon by the claimant. This section provides that—

When any person who has been elected a member of or delegate in Congress dies after the commencement of the Congress to which he has been elected his salary shall be computed and paid to his widow or, if no widow survive him, to his heirs-at-law for the period that has elapsed from the commencement of such Congress or from the last payment received by him to the time of his death. * * *

It is urged that as Mr. Pirce was declared not elected he was not claimant's predecessor, and that the two sections above cited construed together lead to the conclusion that claimant was elected to the whole of the Forty-ninth Congress, as no other person had been elected, and therefore is entitled to pay for the whole term.

We fail to see a distinction between this case and that of Shelley, reported in 19th Court of Claims (p. 653). The facts in that case show that Mr. Shelley was paid as the member *de facto*, as was Mr. Pirce in the case at bar. The House declared Mr. Shelley not elected, as it did Mr. Pirce, but added that Mr. Smith had been elected, and because of his death declared the seat vacant. After the resolution, but during the same Congress, at a second election, Mr. Shelley was returned as member. He was paid salary from the date of the resolution declaring the seat vacant, but not from the prior date of Mr. Smith's death. Salary for this intervening period he claimed in this Court, but his contention was not sustained, the Court holding that—

The statute does not intend that the Government shall pay two salaries for the same seat at the same time, and the term "predecessor" must be restricted to him who was predecessor not in abstract right by virtue of a legal election, but predecessor in the matter of the salary of the place.

7 Mr. Pirce presented the proper credentials. He was sworn in, served, and was paid. He held the position under a color of title at least, and, until ousted by the action of — House, his acts as a member were as legal as those of any of his colleagues. The resolution unseating Mr. Pirce did not seat Mr. Page, and between

its date and the date when the latter was sworn in a vacancy existed in the representation from Rhode Island. Mr. Pirce, when seated, was *prima facie* entitled to his seat, and therefore to the salary (Rev. Stat., §§ 31, 38, 39, 46, 47, 48).

Remembering that the law gives to the sitting member—to him who presents the proper credentials—his salary in monthly payments after he shall have taken the prescribed oath, we turn to the following section (51), upon which claimant relies. This section contemplates a vacancy occurring during the session of Congress, not one existing at its commencement. It says when a "vacancy occurs," "by death or otherwise," "after the commencement of the Congress," the person elected "to fill it" shall be paid "from the time that the compensation of his predecessor ceased." This phraseology, then, refers to a vacancy occurring after the beginning of a Congress, and in that event authorizes a reference back to the predecessor, who is to be found in some individual previously in the same, not a preceding, Congress. This statute does not authorize the claimant to look for his predecessor in the Forty-eighth Congress. He must find him in the Forty-ninth Congress, and that predecessor is found in Mr. Pirce, who held the office and was paid by provision of law.

The only object of the section (51) is to provide as to salary, and the word "predecessor" as used therein must be held to mean predecessor in payment.

Petition dismissed.

8 VI.—*Judgment of the Court.*

CHARLES H. PAGE
*vs.*
THE UNITED STATES. } 15594.

At a Court of Claims held in the city of Washington, on the 12th day of December, 1888, judgment was ordered to be entered as follows:

The Court, on due consideration of the premises, find for the defendants and do order, adjudge, and decree that the petition of the claimant, Charles H. Page, be dismissed.

By the Court.

9 VII.—*Application of Claimant for and Allowance of Appeal to the Supreme Court of the United States.*

CHARLES H. PAGE
*v.*
THE UNITED STATES. } 15594.

From the judgment rendered in the above-entitled cause, on the 12th day of December, 1887, in favor of the defendants, dismissing the petition, the claimant, the said Charles H. Page, by his attorney of record, Allan Rutherford, on the 8th day of March, 1888, makes

application for and gives notice of an appeal to the Supreme Court of the United States.

ALLAN RUTHERFORD,
*Att'y for Claimant.*

Filed March 8, 1888.

Allowed in open court M'ch 8, 1888.

WILLIAM A. RICHARDSON,
*Chief Justice.*

10 In the Court of Claims.

CHARLES H. PAGE
*vs.*
THE UNITED STATES. } 15594.

I, John Randolph, assistant clerk Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the Court and conclusion of law thereon, of the opinion of the Court, of the judgment of the Court, of the application of claimant for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affix- the seal of said Court of Claims, at the city of Washington, on the 10th day of March, A. D. 1888.

[Seal Court of Claims.]

JOHN RANDOLPH,
*Ass't Clerk C't of Claims.*

Endorsed on cover: Court of Claims. No. 1387. Charles H. Page, appellant, *vs.* The United States. Filed March 10, 1888.